STATEMENT OF THE ISSUE

Under the totality of the circumstances, whether Officer Maisel violated Leonard Bruce's Fourth Amendment rights when he conducted an investigative stop based on an anonymous tip and an alleged emergency situation?

STATEMENT OF THE CASE

At about 10:30 a.m. on a Thursday morning, an unidentified informant going by "Susie Myerson" (hereinafter "SM" and "they" due to the uncertainty of the individual's gender) left a tip to the Burlington Police Department's Online Tip Portal. *See* Op. 5. SM alleged a man named "Lenny Bruce" (hereinafter "Lenny") knew SM through their time working at Ben & Jerry's and their mutual enrollment at the University of Vermont. *See id.* Though, according to SM, gun ownership is common within the community SM and Lenny live in, SM not only alleged that Lenny had a gun, but that he intended to use it. *See id.*; *see* Op. 6.

SM stated that they only saw Lenny on occasion at the Gaslight Cafe Coffee shop. *See* Op. 5. SM further alleged that when they saw Lenny that Thursday, he muttered that this was the "last straw" and that he purchased a gun to "convince Mei and Joel to stop messing around." Op. 6. SM said that months back, Lenny told SM that Mei and Joel owed him money. *See id.* SM alleged that Lenny stated he was going to meet Joel at Oakledge Park to talk. *See id.* SM said Lenny left in the direction of Oakledge Park but prefaced the statement with, "Who knows? All I know…." *Id.* SM also stated, "Lenny is a great guy, never knew him to be violent." *Id.* SM concluded with a description of Lenny's vehicle and the bumper stickers on it. *See id.*

Officer Maisel received the tip and tried to confirm the identities of the subjects but was unsuccessful. *See id.* Maisel could not find "Susie Myerson" anywhere in the police database. *See id.* He tried emailing the address SM left in the report but received no reply. *See id.* He also tried

calling individuals with similar names but received no answer. *See id.* Further, though there was someone in the database named "Leonard Bruce," there was no definitive mention of anyone named "Lenny Bruce" anywhere throughout the database. *See id.*

Forty-five minutes later, Maisel decided to pull over a vehicle entering Oakledge Park, matching only some of the details in the tip. *See id.* Upon seeing Maisel's patrol lights, Leonard Bruce (hereinafter "Bruce") immediately pulled over and admitted to possessing cocaine. *See* Op. 7. Bruce filed a motion to suppress the evidence. *See* Op. 5. The District Court did not grant Bruce's motion. *See* Op. 7. Bruce appeals. *See* Op. 3.

STANDARD OF REVIEW

On an appeal for a motion to suppress evidence, the Court reviews a district court's legal determinations *de novo* and finds in the light most favorable to the non-moving party. *See Ornelas v. United States*, 517 U.S. 690, 691 (1996).

ARGUMENT

This is a case about premature decision making. The Fourth Amendment requires that investigative stops be supported by reasonable suspicion, not jumps to conclusions. Here, when SM jumped to the conclusion that Lenny was up to no good, Officer Maisel jumped to the conclusion that SM was reliable. Consequently, Bruce's Fourth Amendment rights were violated.

Officer Maisel never confirmed anything about SM, but the government argues Maisel knew exactly who SM was. SM was one step away from a stranger to Lenny but created a story around a gun they never even saw. SM did not offer any corroborated predictive information, but Officer Maisel acted as if they did. Safe gun ownership is common in the area, but SM and Maisel alike, treated a gun that they did not even know Lenny had, as if it were more inclined to go off.

When these conjectural circumstances are permitted to satisfy our reasonable suspicion requirement, the Fourth Amendment becomes merely imaginative. Citizens must trust that police officers will work to protect their rights rather than try to work a way around them. The court should reverse accordingly.

I. The tip received by Officer Maisel, from an (a) anonymous informant, was not supported by a sufficient (b) basis of knowledge or (c) veracity to generate the requisite reasonable suspicion to stop Bruce.

"Unlike a tip from a known informant, whose reputation can be assessed and who can be held responsible if their allegations turn out to be fabricated… an anonymous tip seldom demonstrates the informant's basis of knowledge or veracity." *Florida v. J.L.*, 529 U.S. 266, 270 (2000). Tips from an (a) anonymous informant must contain a sufficient (b) basis of knowledge and (c) veracity to meet the requisite reasonable suspicion for an investigatory stop. *See id.* Here, the informant was anonymous, and their basis of knowledge and veracity were insufficient to meet the requisite reasonable suspicion for an investigatory stop.

a. Officer Maisel could not (1) assess the credibility and reputation for honesty of the informant and (2) hold the informant accountable for false reporting.

Tips from known sources are afforded much greater deference than anonymous ones. *See id.* Anonymous tips differ from known sources on two determinative grounds: (1) ability to assess the credibility and reputation for honesty of the informant and (2) holding the informant accountable for false reporting. *See id.*

In *Freeman*, the court held that a tip was from an anonymous source since authorities could not assess the credibility and reputation for honesty of the informant and hold them accountable for false reporting. *See United States v. Freeman*, 735 F.3d 92, 99 (2d Cir. 2013). There, the informant called 911 twice but refused to identify herself, and the operator could not re-contact her after multiple attempts. *See id.* The informant's call was recorded, and authorities could track the

informant's apparent phone number, but the court rejected the argument that this deemed her a known informant since her identity remained unknown. *See id.* The court emphasized that authorities never tracked her down before the stop, and that there was a possibility that she was calling from a prepaid phone which would be as anonymous as a call placed from a public payphone. *See id.*

Here, Officer Maisel could not assess the credibility and reputation for honesty of SM and hold them accountable for false reporting. Like *Freeman,* SM did not sufficiently identify themself because though they offered a name to authorities, it presumably was not their real name as Officer Maisel could not find anyone named "Susie Myerson" throughout his database. *See id.*; *See* Op. 6. He sent an email to the address SM left but received no reply. *See* Op. 6. He tried contacting individuals with similar names, but as in *Freeman*, nobody answered. *See id.*; *See Freeman,* 735 F.3d at 99. Further, just like the possibility of an untraceable prepaid phone in *Freeman,* there is no guarantee the email address listed in the report even exists or is not fraudulent by identifying someone else or someone who does not exist. *Freeman*, 735 F.3d at 99. As in *Freeman,* SM was never tracked down before the stop. *See id.*, *See* Op. 6.

The facts differing from *Freeman* are even more persuasive. Unlike *Freeman*, SM submitted one report opposed to two. *See Freeman*, 735 F.3d at 99; *See* Op. 5. In *Freeman,* authorities could track the informant's phone number; here, the anonymous reporting portal does not track anything beyond what a tipster chooses to input. *See Freeman,* 735 F.3d at 99; Op. 5. Accordingly, SM should be deemed anonymous.

b. The informant failed to indicate that their knowledge was based on what they (1) personally saw and (2) their status as an insider.

A tip is more likely to demonstrate a sufficient basis of knowledge if the informant demonstrates their report is based on what they (1) "personally s[aw]" and (2) their "status as an insider." *United States v. Elmore*, 482 F.3d 172, 183 (2d Cir. 2007) (holding an informant

demonstrated a sufficient basis of knowledge by (1) personally seeing the contraband they reported in the location they said it would be and by (2) being the girlfriend and cohabitant of the call's subject). This rule has been established so that authorities need not infer whether the informant is credible from the details and predictive information of the tip. *See id.*

Here, SM offered their information not based on what they saw, but instead on what they allegedly heard from Bruce in a muttered tone at a loud coffee shop on a weekday morning. *See* Op. 5, 6. SM never claimed have to see the gun or have been told where it was, yet proceeded to tell authorities that Bruce was driving around with a gun and might use it. *See* Op. 5. SM alleged that Bruce claimed to be at his "last straw" and that he got the gun to "convince Mei and Joel to stop messing around." Op. 6. Instead of asking more, SM jumped to the conclusion that Bruce, despite being a "great guy" whom she "never knew… to be violent," was a threat who needed to be tamed. *Id.*

Further, SM was not Bruce's partner or cohabitant, but only his former coworker at an international company (Ben & Jerry's) and fellow alumnus at a highly populated public university (University of Vermont). *See* Op. 5. SM even conceded that they only ran into Bruce at the local coffee shop occasionally. *See id.* These surface-level interactions are far more indicative of a casual acquaintance than they are of an actual insider.

The prosecution argues that SM is an insider by alleging that Bruce told SM about his business and that SM knew Bruce's education, work history, and profession. Op. 6. This is unconvincing because people in our society exchange gossip with strangers, much less acquaintances. Even if Bruce told SM about his faulty business relationships, that does not mean he would also share when and where he was carrying a firearm with SM. Further, one's education, work history, and profession are not such intimate details that only an insider would know; rather, they can be obtained easily through a quick LinkedIn or Google search.

Due to SM never having personally seen the gun and not being an insider to Bruce, authorities must infer whether SM is credible from the details and predictive information of the tip—precisely what the rule intended to prevent. Thereby, the informant's basis of knowledge was insufficient.

c. The tip lacked the requisite predictive information to be suitably corroborated by Officer Maisel.

An anonymous tip only demonstrates adequate veracity when it is "suitably corroborated" by "sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop." *J.L.*, 529 U.S. 266, 274 (2000). An anonymous tip may be suitably corroborated when it contains predictive information and therefore leave police with means to test the informant's knowledge and credibility. *See id.* at 271. A stop based upon an anonymous tip is only warranted where the tip is established to be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Freeman*, 735 F.3d at 97, *J.L.*, 529 U.S at 272.

In *Freeman*, the tip could not be suitably corroborated since the anonymous tip failed to contain predictive information. *See Freeman*, 735 F.3d at 99. There, the informant told the dispatcher a Hispanic man, wearing a black hat and white t-shirt, was standing in front of a Chase Bank, arguing with a female, and possibly carrying a gun. *See id.* at 94. The informant then said the subject was "walking towards" and then "standing on the corner of Burke Avenue." *Id.* at 95. The caller did not predict the individual would begin walking in a certain direction, such that it demonstrated that the "tipster had knowledge of concealed criminal activity." *See id.*; *J.L.*, 529 U.S at 272. The court held that because the informant merely identified a determinate person, they did not leave police with sufficient means to test the informant's knowledge and credibility. *See Freeman*, 735 F.3d at 99.

Likewise, SM merely identified a determinate person by alleging immaterial details about Lenny such as his name, appearance, vehicle, and bumper stickers. *See* Op. 5, 6. The informant in

Freeman at least narrowed the subject's location to a specific street corner, whereas SM claimed that Bruce could be anywhere in the Oakledge Park area. *See Freeman*, 735 F.3d at 95; *see* Op. 5. Nonetheless, just as in *Freeman,* SM never offered a single piece of predictive information for police to corroborate. *See Freeman*, 735 F.3d at 95; *see* Op. 5.

Prosecution argues that because SM said Lenny was going to meet Joel at the park, and left in the park's direction, SM predicted Bruce's arrival to the park. *See* Op. 5. These statements are not predictive because SM never specified when Lenny was meeting Joel or that he was currently on his way to the park. *See id.* SM merely alleged that Lenny was supposed to meet Joel at some point and that he left in the park's direction. *See id.* Further, the prosecution's mischaracterization of the facts turns a blind eye to the uncertainty of SM. By prefacing their statements with "Who knows? All I know…" SM showcased their unreliability. *Id.* Due to SM not offering predictive information and merely identifying a determinate person, they did not leave police with sufficient means to test their knowledge and credibility. Accordingly, the tip cannot be suitably corroborated.

II. The tip did not indicate that Bruce was involved in an assault in progress to establish an emergency situation.

An anonymous tip reporting an ongoing emergency may be entitled to a higher degree of reliability and require a lighter showing of corroboration than a tip that alleges general criminality. *See United States v. Simmons*, 560 F.3d 98, 105 (2d Cir. 2009). An ongoing emergency only exists when a tip suggests there is an assault in progress. *See id.* at 104 (holding there was an ongoing emergency when a dispatcher informed police that someone was assaulting someone else with a gun). In determining an assault in progress, authorities must distinguish between an allegation of someone currently using a firearm and mere possession of a firearm. *See Freeman*, 735 F.3d at 100–01 (holding there was no assault in progress when the informant told police that the subject was in possession of a gun and may use it).

SM's statement that there was a man with a gun who might use it does not amount to an assault, and therefore does not constitute an assault in progress. *See* Op. 5. SM alleged that the subject of their call was merely in possession of a firearm but not that they were currently using it. *See id.* Therefore, the tip was not reporting an ongoing emergency and was not entitled to a higher degree of reliability. The tip should have warranted the same showing of corroboration as a tip that alleges general criminality (even though here, no criminality was *actually* alleged).

III. The totality of the circumstances did not lead Officer Maisel to the requisite reasonable suspicion to support an investigative stop of Bruce.

In assessing reasonable suspicion, courts can consider the "totality of the circumstances." *Alabama v. White*, 496 U.S. 325, 330 (1990). The quantity and quality of information possessed by police is considered when evaluating the totality of the circumstance. *See id.*; *see United States v. Cortez*, 449 U.S. 411, 417 (1981). Here, the quantity of information offered by SM was considerable, but collectively irrelevant by merely amounting to a basic batch of details that a stranger could obtain. The quality of the information was also poor because SM's basis of knowledge was not from what they personally saw, or their status as an insider, but rather that of a casual acquaintance attempting to make an educated guess. Furthermore, the information lacked quality because it was not predictive or reliable in its assertion of illegality; rather, it simply identified a determinate person. The totality of the circumstance is that a misinformed informant merely identified a determinate person and jumped to a conclusion about them. If reasonable suspicion may be obtained through such circumstances, Fourth Amendment rights amount to nothing more than wishful thinking.

CONCLUSION

For the foregoing reasons, the District Court's ruling should be reversed.

Respectfully Submitted,

Garett Eldred

Counsel for Appellant

Applicant Details

First Name	**Alexander**
Middle Initial	**L**
Last Name	**Emmons**
Citizenship Status	**U. S. Citizen**
Email Address	**alex.emmons@yale.edu**
Address	**Address** Street **104 York Sq. Place** City **New Haven** State/Territory **Connecticut** Zip **06511** Country **United States**
Contact Phone Number	**7036244050**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2015**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 29, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Forman, James
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Brooks, Meghan
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203-432-3928
Smith, DeMaurice
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References

References are attached to the resume document. Thanks.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

Hon. P. Casey Pitts
District Judge
United States District Court for the
Northern District of California

Dear Judge Pitts:

I am a rising third-year law student at Yale Law School writing to apply for a clerkship in your chambers for the 2024-25 term or the following year. As a student interested in consumer protection law and public interest work, I am excited about the possibility of clerking in your chambers.

My writing and research skills would make me an effective judicial clerk. In Yale Law's Veterans Clinic, I researched and wrote major portions of briefs submitted to the Court of Appeals for Veterans Claims. Through Yale's Housing Clinic and my summer work experience, I drafted sections of briefs for foreclosure cases in Connecticut, Maryland, and Maine. In addition to honing my skill as a legal writer, that work has informed my passion for legal aid and consumer advocacy.

Before coming to law school, I worked as a reporter in DC for *The Intercept*, a news website committed to investigative journalism on civil liberties and justice issues. In that position, I researched, wrote, and edited publications on a deadline, and I paid meticulous attention to facts when conducting interviews and research.

Thank you for your consideration. My resume, law school transcript, writing sample, and references are enclosed. Letters of recommendation from Professors James Forman Jr., Meghan Brooks, and DeMaurice Smith are forthcoming. I would welcome the opportunity to interview with you and look forward to hearing from you.

Sincerely,
Alex Emmons

Alexander L. Emmons

104 York Square Place · New Haven, CT 06511 · 703-624-4050
alex.emmons@yale.edu

EDUCATION

Yale Law School, New Haven, CT. *Aug. 2021-May 2024, expected*
Juris Doctor, 2024 expected
- Activites: Veterans Legal Services Clinic, Yale Housing Clinic, YLS Chess Club

Yale College, New Haven, CT. *Aug. 2011-May 2015*
Bachelor of Arts, *magna cum laude*, in Ethics, Politics, and Economics
- GPA: 3.89, Distinction in the Major
- Rhodes Scholarship Finalist, District 9, 2014-15
- Thesis: *The Opportunity Cost of Just War: a New Principal of Jus ad Bellum Ethics*

Robinson Secondary School, Fairfax, VA. *Sept. 2007-June 2011*
- Class Valedictorian, Braddock District Young Person of the Year

PROFESSIONAL EXPERIENCE

National Consumer Law Center, *Legal Intern.* Boston, MA. *May 2023-Present*
- Assisting with litigation related to consumer debts, including mortgage foreclosure and auto loans
- Researching and writing sections of an amicus brief submitted to Maryland Appellate court about the *Merrill* doctrine and state usury laws

Yale Law School Housing Clinic. *January 2023-Present*
- Gathering facts, conducting legal research, drafting discovery documents, and writing briefs
- Will argue a foreclosure case in front of the Connecticut Supreme Court in September

Veterans Legal Services Clinic. *September 2022-Present*
- Researching and writing briefs for the Court of Appeals of Veterans Claims about healthcare entitlements for servicemembers with other than honorable discharges
- Advocating for Veteran clients in benefits appeals with the VA

Pine Tree Legal Assistance, *Legal Intern.* Portland, ME. *June-August 2022*
- Researched and drafted sections of briefs and motions in foreclosure cases, including an appeal brief to the Maine Supreme Court
- Conducted legal research on foreclosure cases, auto loan cases, and consumer debt law in Maine
- Conducted client intake regarding consumer debt and eviction issues

The Intercept, *Reporter.* Washington, D.C. *January 2016-May 2021*
- Reported primarily on national security topics, particularly from Captiol Hill and the Pentagon
- Researched and wrote stories on legislation, arms sales, and classified briefings on Capitol Hill
- Reported on documents obtained both under FOIA and through souces

U.S. House Committee on the Judiciary, *Democratic Staff Intern.* Washington, D.C. *June-August, 2014*
- Assisted committee staff with committee markups and oversight hearings
- Researched and wrote memos on FBI oversight and drone surveillance technology

Skills and Interests:
- Language Skills: Latin (reading) and Arabic (introductory)
- Tournament Chess. USCF Rating 2093 (97th percentile)
- Writers Guild East, Member 2017-2021

Alex Emmons
Yale Law School, JD 2024
703-624-4050
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Professional References:

John Van Alst
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781-369-5164
jvanalst@nclc.org

John Van Alst oversees NCLC's advocacy on auto finance. He is my current supervisor and can speak to my work this summer researching and writing about credit reporting and auto issues, as well as my ability to finish projects on a deadline.

Jeffrey Gentes
George W. and Sadella D. Crawford Visiting Clinical Lecturer in Law
(860)-997-7595
Jeffrey.Gentes@yale.edu

Jeff Gentes oversees the foreclosure defense practice within the Yale Law School Housing Clinic. He can speak to my work in the clinic, which has included legal writing and research.

Jonathan Selkowitz
Managing Attorney, Pine Tree Legal Assistance
207-400-3207
jselkowitz@ptla.org

Jonathan Selkowtiz is the managing attorney at the consumer law practice of Pine Tree legal Assistance, and was my supervising attorney this past summer. I worked with Jonathan to help draft an appeal brief to the Maine Supreme Court, so he can speak to my abilities as a legal writer.

Vanessa Gezari
National Security Editor, The Intercept
Vanessa.gezari@theintercept.com

Vanessa Gezari is the national security editor at The Intercept and my former supervisor. She can speak to my interviewing and writing skills.

YALE LAW SCHOOL
Office of the Registrar

TRANSCRIPT RECORD

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Date Entered: Fall 2021

Candidate for : Juris Doctor MAY-2024

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2021					
LAW	10001	Constitutional Law I:SectionB	4.00	CR	R. Siegel
LAW	11001	Contracts I: Section A	4.00	CR	S. Carter
LAW	12001	Procedure I: Section C	4.00	CR	N. Marder
LAW	14001	Criminal Law & Admin I: Grp 1	4.00	CR	J. Forman
		Term Units	16.00	Cum Units	16.00
Spring 2022					
LAW	21068	Antitrust	4.00	H	G. Priest
LAW	21136	Employment and Labor Law	3.00	H	C. Jolls
		Substantial Paper			
LAW	21381	Law of Sports Leagues	2.00	H	D. Smith
LAW	21610	Torts and Regulation	4.00	H	I. Ayres
LAW	50100	RdgGrp: Animals and the Law	1.00	CR	D. Kysar
		Term Units	14.00	Cum Units	30.00
Fall 2022					
LAW	20032	Advanced Legal Writing	2.00	H	R. Harrison
LAW	20207	Property and Regulation	4.00	P	D. Schleicher
LAW	20611	Immigration Law	4.00	P	A. Kalhan
LAW	30123	Veterans Legal Services Clinic	2.00	H	J. Parkin, M. Brooks
LAW	30124	VeteransLegalServicesFieldwork	2.00	H	J. Parkin, M. Brooks
		Term Units	14.00	Cum Units	44.00
Spring 2023					
LAW	21277	Evidence	4.00	P	S. Carter
LAW	21601	Administrative Law	4.00	P	N. Parrillo
LAW	30116	Housing Clinic: Fieldwork	2.00	H	J. Gentes, T. Silverstein, D. Pruslow
LAW	30122	Housing & CommunityDev Seminar	2.00	H	J. Gentes, T. Silverstein, D. Pruslow
LAW	30125	Advanced VLSC Seminar	1.00	CR	M. Wishnie, M. Brooks
LAW	30126	Advanced VLSC Fieldwork	2.00	H	M. Wishnie, M. Brooks
		Term Units	15.00	Cum Units	59.00

********************* END OF TRANSCRIPT *********************

HEATHER ABBOTT, REGISTRAR

Official transcript only if registrar's signature, embossed university seal and date are affixed

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

Please accept this letter on behalf of Alex Emmons, who is applying to clerk in your chambers. I've known—and been impressed by—Alex since his first day of law school. I recommend him highly.

Alex was a student in my criminal law small group during his first semester. With only 16 students in the class, I got to know each of them well and to see their writing first-hand. Perhaps because he was a few years older than many of his peers, Alex had a relaxed, friendly, unselfish vibe that was a nice companion to some of his more intense classmates. Not that he didn't work hard—he did—but he worked with a reassuring calmness. Alex didn't speak in class often, but when he did, his comments were consistently creative. While some students talk to hear their own voice, or to impress, Alex only speaks when he has something important to say. When I asked the teaching assistants for their perspectives on Alex at the end of the semester, they noted how he frequently looked for ways to support and affirm his peers, some of whom found acclimating to law school more difficult.

Towards the end of the first semester, students turn in a 20-page brief on a novel legal issue. That's asking a lot of brand-new law students, but Alex did an excellent job. Perhaps due to his five years writing for The Intercept, he has honed the art of clear, organized, vivid expression, using no more words than necessary to explain the point.

Since arriving at Yale, Alex has spent a lot of time developing his already substantial talents as a writer. In both the Veterans and Housing clinics, he worked on multiple briefs and numerous other writing assignments. Perhaps importantly for purposes of your chambers, Alex has often worked in teams. In these two clinics, students don't just split the brief and each write half. They instead develop arguments together, providing detailed feedback to each another along the way. I am confident that Alex's experience collaborating on legal writing will make him an effective clerk and colleague to his co-clerks.

Alex's maturity and independent thinking have been on display in the clerkship application process. This can be a crazy-making time for students, many of whom respond by blanketing the country with applications. Alex, by contrast, has been thoughtful and deliberative. He hopes to practice in legal aid and consumer law, and he's chosen a small number of judges with at least some experience in those areas and in locations he'd like to live.

I hope you have the chance to interview Alex and see for yourself what a gem he is. If I can be of further assistance in your selection process, please e-mail me or call my cell phone at 203.915.8781.

Sincerely,

James Forman, Jr.

James Forman - james.forman@yale.edu

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am delighted to recommend Alex Emmons for a clerkship in your chambers. I met Alex in the fall of his 2L year, when he enrolled in the Veterans Legal Services Clinic that I co-teach. Alex had come to law school after spending over five years as a national security reporter. He sought to transition from writing about abuses of power to fighting them, and immediately contributed a reporter's probing questioning of the status quo to seminar discussions and his case teams. In working with Alex in the classroom and in his fieldwork, I have come to rely on his sharp analytical mind to identify the problem at hand and multiple viable avenues to attack it. (He is, in addition to everything else, a sought-after chess coach!) But I have especially valued working with Alex because he is deeply committed to achieving justice for his clients, and doing right by them at every step. He is principled, kind, and ready to dive into whatever needs doing.

Alex has represented two very different clients under my supervision – both exceptionally well. In the fall semester of his 2L year, Alex was assigned to two very different clients in matters related to military toxic exposures: local veteran Jorge Martell, who drank benzene-poisoned water at Camp Lejeune but was denied access to VA healthcare, and Stronghold Freedom Foundation (SFF), an upstart nonprofit advocating for veterans exposed to nerve agents and other toxins in Uzbekistan in the immediate aftermath of 9/11. Within days of receiving dense and scientifically complex case files spanning decades, Alex was fully in his matters, down to the smallest details. Despite never having worked in veterans law, he was quickly asking exactly the right questions, forming case plans, and building client connections.

Alex's ability to make useful contributions very early in the semester was especially impressive in SFF, where he was the only green member on a well-seasoned student team. He helped the team realize early in the semester that what SFF really needed to achieve its advocacy goals was information. Alex helped his teammates parse hundreds to thousands of dense pages of already public records to identify what other unreleased records might exist, and learn the vocabulary to accurately describe them. He then drafted a technically precise set of Freedom of Information Act requests, layering his more newly developed legal analysis skills onto his foundation in reportage to ensure that the requests would be unambiguous.

At about the midpoint of the fall semester, one of his teams were confronted with a true crisis (no fault of their own). I was and remain impressed by Alex's level head, his ability to soberly assess the situation and its time sensitivity, conduct and debate the relevant legal research with his team and supervisors, develop a plan of action, and immediately put it into effect. Alex and the team (supervisors included) were in the office late that first night, and terribly stressed, but Alex and his team's ability to see the humor in it all made working towards resolution something of a joy.

Alex has really shone, however, in representing Mr. Martell (who requested that his story be widely told.) Mr. Martell had been discharged less-than-Honorably for leaving Camp Lejeune to seek medical care when he began experiencing its symptoms. As a result, he was denied access VA benefits, including healthcare. When Alex met his client, all Mr. Martell wanted was VA recognition that he was dying of Camp Lejeune-related cancers before it was too late. Alex and his teammate quickly recognized that Mr. Martell had only a slim chance of succeeding on the merits of the most obvious claim, and that the usual channels would take far too long. So, they devised a creative yet sound plan to revive a wrongly unadjudicated 2010 claim through a petition for an extraordinary writ of mandamus. Over the next few months, they filed excellent briefing, and motions for advancement on the docket and for leave to reply to the Secretary's error-riddled brief, and handled contentious conversations with opposing counsel. Alex did excellent legal work on unusually tight deadlines, including while bringing a new team member (a 1L) up to speed within the first two weeks of the spring semester.

As Mr. Martell got sicker, Alex maintained the utmost professionalism, finding ways to respect his client's little remaining time with his family while getting the necessary client direction. Mr. Martell died in the hours before the Court of Appeals for Veterans Claims denied his writ. But he died knowing that he had people fighting for him to the end, as he would often say. Alex's grace towards the family and in supporting his teammate through an emotionally difficult representation was wonderful to witness, despite the deep sadness we all felt.

I highly recommend Alex as a gifted legal researcher and analyst, and a truly generous colleague. I know that he will devote his considerable talents to bettering the area of the law he devotes himself to, and will be a valuable contributor to your chambers. Please do not hesitate to contact me for any additional information.

Sincerely,

Meghan Brooks
Robert M. Cover Fellow, Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization*

*Please note that as of June 16, 2023, I will have moved to an Assistant Professor appointment at the University of South Carolina School of Law. After June 16, I can be reached at mb233@mailbox.sc.edu or (781) 910-7146.

Meghan Brooks - meghan.brooks@yale.edu - 203-432-3928

Meghan Brooks - meghan.brooks@yale.edu - 203-432-3928

June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

It is my pleasure to recommend Alex Emmons for a clerkship in your chambers. Mr. Emmons was a student in my seminar class, Law of Sports Leagues, which I have taught for 2 years at Yale Law School. The course focuses difficult questions that arise in sports litigation, including complex disputes in antitrust law, employment and labor law, and contract law, among other areas. In teaching the course I draw on my 14 years of experience as Executive Director of the NFL Players Association, the labor union representing professional football players of the National Football League.

I consider skilled writing to be an essential tool in the arsenal of a good lawyer, and Mr. Emmons distinguished himself through his analytical writing ability. Throughout the course, I ask my students to write a series of rapid response papers about difficult questions – like the extent to which a multi-team sports league is a “single entity” for antitrust purposes. Mr. Emmons always handed in papers that were well researched, organized, and clear in their arguments.

In his papers and class participation, Mr. Emmons was not content to cite a handful of cases and defend an “easy” position. In one of his final papers, he defended a position contrary to many courts holdings, and argued that courts should generously apply antitrust law to enjoin restrictive team contracting practices. The paper not only addressed legal counterarguments, but responded to other liberal advocates who argue that collective bargaining is a more appropriate venue to raise those concerns. I believe Mr. Emmons’ diligence and willingness to engage with nuance in writing will make him an effective and successful clerk.

Based on his writing skills, enthusiasm, and engagement, I have no hesitation in recommending Mr. Emmons. I believe he will make an excellent clerk in your chambers and, in the not-to-distant future, an accomplished attorney. Please reach out to me directly at 202-412-3322 if you have any questions. Thank you for your time and consideration.

Sincerely,
DeMaurice F. Smith, Esq.
Executive Director

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WRITING SAMPLE

I wrote the below memorandum for Yale Law School's second-year advanced legal writing seminar. The work is entirely my own. We were presented with a hypothetical contract dispute over the sale of an electrical generator. Our assignment was to write a memorandum analyzing whether the Article II of the Illinois Commercial Code, which applies to contracts that are predominantly "transactions in goods," applies to the contract. I took the position that it does.

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TO: Managing Partner Rob Harrison
FROM: Alex Emmons
RE: Gerken Energy, Case # XXX-XXXX
DATE: Monday, November 21, 2022

Question Presented:

This firm represents Gerken Energy ("Gerken"), a Danish manufacturer of diesel generators. Gerken executed a contract in 1982 with Harrison Laboratories ("Harrison"), an energy firm headquartered in Illinois. Under the contract, Gerken sold Harrison a diesel generator and engine, which Gerken had to design, fabricate, assemble, and install. Article II of the Illinois Commercial Code applies to contracts that are predominantly "transactions in goods," not contracts that are predominantly for the provision of services. Does the Article II apply to the contract?

Brief Answer:

Article II likely applies to the contract. The diesel generator and engine meet the statutory definition of "goods" because they were movable "at the time of identification to the contract for sale," which occurred no later than when Gerken shipped them. Because the engine and generator are "goods," Illinois courts would likely find that the sale of "goods" is the "predominant factor" in the contract for four reasons. First, the text of the contract refers to the parties as "seller" and "purchaser" and frames the sale of the equipment as the primary purpose of the contract. Second, the Agreement contains warranties typical in the sale of goods. Third, the contract contemplates the levying of sales tax, which is not included in service contracts. Finally, the contract is not a construction contract, which courts consider service contracts. The sale of goods is therefore the predominant factor the contract, so Article II applies to the contract.

Statement of Assumed Facts:

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Our client, the Danish generator manufacturer Gerken Energy ("Gerken"), began negotiating a contract with the Illinois energy firm Harrison Laboratories ("Harrison") in April 1982. On April 23rd, 1982, Gerken and Harrison signed the Costa Rica Cooperation Agreement (the "Agreement"), a contract under which Gerken agreed to provide a diesel engine, a generator, and auxiliary equipment (the "Equipment" or "diesel generator") to a power plant in Costa Rica owned by Harrison.

The Agreement contained the following provisions:

(1) The Agreement is governed by Illinois law. (Agreement, 15).

(2) The Agreement defined the parties as "Purchaser" (Harrison) and "Seller" (Gerken). The Agreement has a section titled "Purchase and Sale," which describes the role of Gerken as "sell[ing] the Equipment to the Purchaser," and the role of Harrison as "purchas[ing]… the Equipment from Seller." (Agreement, 2-3).

(3) Under The Agreement, Gerken agreed to pay "any sales tax… lawfully levied or assessed… by any taxing authority other than the United States and Costa Rica," and Harrison agreed to pay "all taxes charges, import duties, assessments, or other charges lawfully levied or assessed by the United States or Costa Rica." (Agreement, 14).

(4) Gerken is required to design the Equipment according to Harrison's technical specifications. The Agreement provides that after undergoing factory testing, Gerken would ship the equipment to Costa Rica.

(5) Title to the Equipment would pass from Gerken to Harrison upon delivery in Costa Rica. (Agreement, 7)

(6) The Agreement required Gerken to provide ongoing technical assistance, including installation instructions and "12 man months of technical guidance and assistance." (Agreement,

(7) The Agreement contains the following warranties: "[Gerken] warrants that the Equipment will be free of defects in material, workmanship, and design for a period of twelve months from the date of final acceptance… Such 12 month warranty period shall be extended by one full day for each full twenty-four hour period that the Equipment is inoperable due to failure[;]…however[,]… in no event shall the warranty period be longer than 24 months." (Agreement, 11-12).

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(8) The Agreement also guarantees that a "seller's service representative" will be present to provide technical support for a twelve month period. *Id.*

Initially the Agreement provided that Harrison would install the Equipment, with instructions and technical assistance provided by Gerken. However, in October 1982 Harrison and Gerken entered into a change order that provided that Gerken would install the Equipment at the Costa Rica power plant. After the installation of the Equipment by Gerken, Harrison alleged that there were defects in the Equipment that rendered it partially inoperable. Harrison is pursuing claims for damages.

Applicable Statutes:

810 Ill. Comp. Stat. 5/2-501 (2021):

> "Article [II] applies to transactions in goods. . ."

810 Ill. Comp. Stat. 5/2-505 (2021):

> "Goods" are defined as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale. . ."

810. Ill. Comp. Stat. 5/2-501 (2021):

> [Identification for future goods occurs when] "goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers."

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Discussion:

Article II of the Illinois Commercial Code applies to "transactions of goods." 810 Ill. Comp. Stat. Ann. 5/2-102. For Article II to apply to the Agreement, the Equipment must meet the code's definition of "good," and its sale must be the "predominant factor" in the contract while the provision of services is merely "incidental."

(1) The Equipment was movable at the time of identification to the contract, and thus meets Article II's definition of "goods."

For Article II to apply to the Agreement, the Equipment must meet the statutory definition of "good." The Illinois Commercial Code defines "goods" as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale." 810 Ill. Comp. Stat. Ann. 5/2-105. The "time of identification" is a technical term. If goods already exist when the contract was made, the "time of identification" simply refers to the time the contract was executed. 810 Ill. Comp. Stat. 5/2-501(1)(a) put year in. Put this in applicable statute section But for "future goods" – goods that do not yet exist when parties contract for their sale – the "time of identification" refers to when "goods are shipped, marked or otherwise designated by the seller as the goods to which the contract refers." 810 Ill. Comp. Stat. 5/2-501(1)(b). Future goods, therefore, meet the definition of goods if they are "moveable" when they are "shipped, marked or otherwise designated by the seller as the goods to which the contract refers." *Id.*

Thus, for the Equipment to count as "goods," it must be "moveable" at this time of identification. When Gerken and Harrison executed the Agreement, the Equipment did not yet exist – Gerken agreed to design and fabricate it according to Harrison's specifications. The Equipment is therefore a "future good." For the Equipment to count as "goods," it must therefore

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be "movable" at the time of identification, which is defined for future goods as when they are "shipped, marked or otherwise designated… as the goods to which the contract refers." 810 Ill. Comp. Stat. 5/2-501(1)(b).

The exact moment the Equipment became identifiable is open to interpretation. Because the Equipment was designed and specially manufactured, the Equipment was possibly designated as the "goods to which [the] contract refers" at the point of fabrication. Alternatively, it could refer to the point of shipment from Denmark to Costa Rica. What is clear is that the Equipment was movable at either of these times.

It could be argued that large, industrial equipment is not easily moveable, and is therefore not a good. However, Illinois courts have consistently held that industrial equipment is "moveable" as long as it can be shipped. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976); *see also Meeker v. Hamilton Grain Elev. Co.*, 442 N.E.2d 921 (Ill. App. 3d., 1982). In *Pittsburgh-Des Moines Steel Co.,* the Seventh Circuit ruled that a million-gallon water tank was a "good" despite its unwieldy size. The tank was fabricated at a factory and then shipped to the installation site, so the court reasoned that it was a "moveable thing." *Id.* at 580. "We are unaware of any authority that specially manufactured small [items] should be goods and a very large tank not so classified," the court reasoned. *Id.* In *Meeker*, the court held that two large grain silos were goods, because they were moved in pieces and assembled at the point of installation. They were therefore moveable and thus goods under Article II. *Meeker*, Ill. App. 3d 668, at 923.

Like a million-gallon tank or a large grain silo, the Equipment is made up of large industrial machinery. Despite its size, courts would find it is "moveable… at the time of identification" and thus meets to the definition of "goods" under the statute.

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(2) The Sale of the Equipment is the Agreement's Predominant Purpose

Because the Equipment meets the definition of "goods," the Agreement is a contract for both goods and services. When evaluating whether Article II applies to contracts that mix the sale of goods with the provision of services, Illinois courts apply the "predominant factor" test, which examines whether the sale of goods or services is the "predominant factor" in the contract, and which is "incidental." *Meeker v. Hamilton Grain Elev. Co.*, 442 N.E.2d 921 (Ill. App. 3d., 1982), (quoting *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974)). Illinois courts have looked to four factors in evaluating whether goods are the "predominant factor" in a contract for sale:

i) whether the text of the contract uses terms typical of goods or services,

ii) whether warranties are typical of goods or services contracts,

iii) whether the contract charges sales tax, and

iv) whether the contract is a construction contract.

i) **The Text of the Contract Uses Terminology Typical of a Sale of Goods**

Courts have looked to the text of a contract to establish whether it is predominantly for the sale of goods. For example, when a contract refers to parties as "purchaser" and "seller," those labels indicate that the primary purpose of the contract is the sale of goods. *Meeker*, 442 N.E.2d 921, 923 (Ill. App. 3d., 1982). Conversely, when a contract uses labels like "contractor" and "owner," it indicates the contract is predominantly for the provision of services. *Nitrin, Inc. v. Bethlehem Steel Corp.*, 342 N.E.2d 65, 594 (Ill. App. 3d., 1976).

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The Agreement uses terminology typical of a contract for goods. Like the *Meeker* contract, the Agreement refers to Harrison as "purchaser" and "Gerken" as "seller," suggesting that the Agreement's predominant purpose is the sale of goods.

Illinois courts have also analyzed language in the preamble of mixed contracts to determine their predominant purpose. When a mixed contract's introductory language describes the purpose of the contract as the sale of goods, it emphasizes that the sale of goods is likely the predominant factor. *Tivoli Enter., Inc. v. Brunswick Bowling & Billiards Corp.*, 646 N.E.2d 943, 98 (Ill. App. 3d., 1995). In *Tivoli*, the court held that because the preamble described the purpose of the contact as an order for "material… installation of items… and equipment," that it "suggests the thrust of the contract as being one for the sale of goods." *Id.* By contrast, in *Nitrin*, the court found that because the contract preamble represented the defendant as being in the "designing and constructing" rather than "selling" business, the contract indicated it was predominantly for the provision of services. *Nitrin*, 35 Ill. App. 3d 577, at 594.

The introduction of the preamble to the Agreement has a section heading "Purchase and Sale," which provides that the role of Gerken is to "sell the Equipment to the Purchaser," and that the role of Harrison is to "purchase the equipment from seller."(Agreement, 2-3). So like the terms in the *Tivoli* contract, the Agreement's preamble language describing the "sale" identifies the purpose of the agreement as the sale of goods. The text of the Agreement therefore suggests that it is predominantly for the sale of goods.

ii) The Agreement Has Warranties Intended to Protect Goods

When evaluating "mixed contracts," Illinois courts also examine whether the transaction's warranties refer primarily to the goods or services. When warranties primarily speak to guaranteeing the merchantability of goods sold, it suggests the contract is predominantly for the

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sale of goods. *Tivoli*, 646 N.E.2d 943 (Ill. App. 3d., 1995). In *Tivoli*, a contract provided a five-year warranty that guaranteed bowling lanes would be "free from defects in materials and workmanship," while only providing a one-year service warranty for labor in replacing defects. *Id.* at 647. Because the warranties aimed at securing the quality of the goods on balance, the court ruled that the "warranty runs to the goods, not the services incidental thereto," so the contract was predominantly for the sale of goods. *Id. See also Bonebrake,* 499 F.2d 951, at 958 (where the court ruled a provision guaranteeing "[bowling] lanes free from defects" does not comport with the provision to services).

Like the *Tivoli* contract, the Agreement also has a mixture of goods and service warranties. The Agreement contains a warranty guaranteeing that "the Equipment will be free from defects in material, workmanship, and design for a period of 12 month from the date of final acceptance…" This language is nearly identical to the warranty in *Tivoli* that the court concluded "runs to the goods." 646 N.E.2d 943 at 647. However, unlike in *Tivoli*, the warranty on goods does not exceed the duration of the services warranty. See Agreement at 12, where a warranty requires the presence of a "seller's service representative" and onsite technical assistance for the same period.

Because the duration of the goods and services warranties are identical, the predominance of goods warranties is less clear than in *Tivoli*, where the service warranty only lasted one year. But because the service warranties arguably seem to support the goal of keeping the Equipment free of "defects in material, workmanship, and design," it is likely that on balance the warranties "run to the goods." Regardless, it is unlikely that Illinois courts would view service warranties in the Agreement as the dominant factor. Even if courts view the warranties as applying equally to

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goods and services, it does not suggest the Agreement is predominantly for the provision of services.

iii) The Text of the Agreement Assesses Sales Tax on the Seller

When courts apply the predominant purpose test, they examine whether a contract charges sales tax, which is assessed for transactions of goods but not services. When a contract charges sales tax on the total value of the contract, it signifies that the sale of goods is predominant and the sale of services is incidental. *Meeker*, PUT THE OTHER ONE110 Ill. App. 3d 668, at 923. In *Meeker*, for example, the court held that because sales tax was charged on the total value of a contract to assemble grain silos, the contract was primarily for the sale of goods. Illinois courts have been willing to apply this rule without proof that sales tax was actually charged. *Bob Neiner Farms, Inc. v. Hendrix*, 490 N.E.2d 257, 789 (Ill. App. 3d., 1986). In *Bob Neiner Farms*, the court cited the *Meeker* rule even though there was ""no proof… that the builder charged sales tax," because "the…contract suggests some sales tax was included in the contract price." *Id.* The court's holding suggests that if a contract accounts for some sales tax – even if it is not assessed for the entire contract price – the contemplated sales tax shows that the parties intended the contract to be predominantly for the sale of goods.

The Agreement contains an unusual clause relating to sales tax: "Any sales or use tax…lawfully levied… on the sale of the Equipment… by any taxing authority other than the U.S. or Costa Rica shall be paid by Seller, and all taxes…lawfully levied by the United States and Costa Rica shall be paid by the purchaser." (Ag. 14.) It is unclear from this provision why a foreign jurisdiction would assess sales taxes. But it is clear that the parties intended Harrison to pay sales tax in Costa Rica – the location of the Equipment when title would pass from Gerken to Harrison (Agreement, 3). As in *Bob Neiner Farms*, there is no proof that sales tax was assessed.

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But because the Agreement contemplates the imposition of sales tax in the purchaser's jurisdiction, it demonstrates that the parties intended Harrison to pay sales tax. Therefore the sales tax provision in the Agreement would likely lead Illinois courts to conclude it is predominantly for the sale of goods.

iv) The Agreement is neither a construction nor employment contract.

Even though the Agreement does not refer to parties in the manner typical of construction contracts, one could still argue that Agreement is still a construction contract. Illinois courts have held that construction contracts are contracts predominantly for services. *Nitrin, Inc. v. Bethlehem Steel Corp.*, 342 N.E.2d 65 (Ill. App. 3d., 1976) at 68.

In *Nitrin*, the court held that a contract for "engineering and construction" work was predominantly a contract for services. *Id.* Even though a construction contract may involve the sale of equipment or goods, it does not necessarily mean that it is predominantly for goods. *Boddie v. Litton Unit Handling Sys., a Div. of Litton Sys., Inc.*, 455 N.E.2d 142 (Ill. App. 3d., 1983). In *Boddie*, the court ruled that the design and installation of a specially designed conveyer belt was a construction contract even though the conveyer was movable in its constituent parts. *Id.* at 152.

In October of 1982, Harrison and Gerken entered into a contract change order that required Gerken to install the Equipment at Harrison's Costa Rica plant. One could argue that this change order fundamentally altered the Agreement into a contract predominantly for the sale of services. Like the construction contractors in *Boddie* and *Nitrin*, Gerken was then responsible for not only all of the design and engineering components, but the assembly and construction of generator. Because the Equipment is sizeable and takes up much of the space in the power plant,

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it could be argued that the change order commits Gerken primarily to design and construction services. If the Agreement is predominantly one for design and construction services, it cannot be predominantly for the sale of goods, and Article II would not apply.

However, the Agreement can be distinguished from the contracts in *Boddie* and *Nitrin* because it lacks two essential properties of construction contracts. First, construction contracts are "general," encompassing "the erection of buildings, the installation of utilities…with extensive excavation and demolition…" *Boddie,* 455 N.E.2d 142 at 150. In *Boddie* the court noted that the construction contract required the defendant to "complete various alterations and modifications on the building," "complete… utilities and services, including drainage, pavement, walks, and fencing." *Id.*

Even after the change order, the Agreement between Gerken and Harrison did not go further than requiring Gerken to install the Equipment. Unlike in *Boddie*, Gerken did not have to modify the building, install building utilities, or ensure that drainage, pavement, and fencing were functional. The Agreement is distinguishable from the construction contract in *Boddie* because Gerken did not have to perform any construction tasks beyond installing the Equipment.

Second, under a construction contract the builder never has title to the raw materials used in construction. In *Nitrin*, the court ruled that the "most important" factor that made the contract is that "title to all machinery and equipment and supplies for the work shall, as between Owner and Contractor, be in Owner." *Nitrin,* 342 N.E.2d 65 at 69. Put another way, the party that was selling construction services never owned any of the equipment it installed.

The Agreement provides that Gerken initially had title to the Equipment. Title in the Equipment did not pass from Gerken to Harrison until delivery of the Equipment in Costa Rica. (Agreement, 7). The Agreement is unlike the *Nitrin* transaction because Gerken had title to the

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equipment that it was selling to the purchaser, and then title was transferred, which is typical of a contract predominantly for the sale of goods.

Conclusion:

Article II likely applies to the Agreement. The Equipment meets the Code's definition of "good" because it was moveable at the time of "identification" to the contract for sale. The time of "identification" could refer to either when it was fabricated or shipped, but the Equipment was moveable at both times and is therefore meets the definition of goods. The Agreement therefore contains both goods and services, and courts will likely find that the predominant purpose of the Agreement is the sale of goods for four reasons. First, the text of the Agreement demonstrates that the purpose of the Agreement is for a "seller" to sell the Equipment to a "purchaser." Illinois courts identify these terms with contracts predominantly for the sale of goods. Second, it contains warranties typical in the sale for goods. Although the Agreement contains service warranties of equal duration, courts would likely find these run to the goods. Third, although there no proof sales tax was charged in the agreement, the Agreement's terms account for sales tax in the purchaser's jurisdiction. That demonstrates that the parties intended sales tax to be paid, indicating a sale predominantly of goods. Finally, although it could be argued that the change order transformed the Agreement into a construction contract, the Agreement is distinguishable from typical construction contracts for two reasons. First, the Agreement lacks any generalized construction obligations, and second, it indicates the passage of title in the Equipment, so it is not a construction contract. Therefore, the Agreement is predominantly for the purpose of selling the Equipment and is covered under Article II.

Alex Emmons
alex.emmons@yale.edu

Writing Sample

As a summer intern at Pine Tree Legal Assistance, my supervising attorney asked me to write part of the argument for an appeal brief to the Maine Supreme Court. The case was about whether parties must complete Maine's statewide foreclosure mediation program (called the "Foreclosure Diversion Program," or "FDP") before filing for summary judgement.

Though I wrote this section of the brief, my supervisor provided his comments, revision suggestions, and editing. This draft contains only the sections of the argument (as well as the argument summary and issue presented) that were written by me. To ensure that I am submitting only my own work, I have written an abridged facts section for this sample that only encompasses facts relevant to this section of the argument.

I am using this with permission from my employer. To preserve confidentiality, I have changed the names in this draft and redacted the docket number and client's address. To verify that this is my own work and is used with permission, feel free to reach out to my supervising attorney, Jonathan Selkowitz, at the following contact information:

Jonathan E. Selkowitz
Managing Attorney, Pine Tree Legal Assistance
(207) 400-3207
jselkowitz@ptla.org

Citations follow the standard Bluebook format for the State of Maine. Factual citations reference the appendix we submitted with the appeal brief, designated as (A. page number at ¶ paragraph number).

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. XXX-2022-XX

BENJAMIN JOHNSON and AMY JOHNSON,
Plaintiff – Appellee,
v.
JOHN DOE,
Defendant – Appellant

ON APPEAL FROM THE CALAIS DISTRICT COURT

DOCKET NO. CALDC-XX-XX-XXXX

BRIEF OF APPELLANT JOHN DOE

Jonathan E. Selkowitz, No. 5711
Pine Tree Legal Assistance, Inc.
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(207) XXX-XXXX
XXXXXX@ptla.org

Counsel for Appellant John Doe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

Appellant John Doe ("Doe") owns a home located at [REDACTED ADDRESS], Maine (the "Property"). (A. 10 at ¶ 3.) On August 13th, 2014, Doe signed and delivered a promissory note and mortgage on the Property to Appellees Benjamin Johnson and Amy Johnson. (*Id.* at ¶¶ 4-5.)

The Johnsons commenced this foreclosure action by serving Doe with a summons and a complaint on December 17th, 2019. (A. 2.) Proceeding pro se, Doe filed a timely answer requesting mediation in Maine's Foreclosure Diversion Program ("FDP"). (*Id.*) On January 3rd, 2020, The Calais District Court issued a notice scheduling the case for FDP mediation. (*Id.*) The Calais District Court then transferred the case to the Ellsworth District Court for the first mediation to take place on March 6th, 2020. (A. 3.)

Doe and the Johnsons attended the first mediation on March 6th, 2020. (A. 30-33.) The Mediator's Report states that the parties agree to work together "to obtain a property inspection and appraisal" on the Property. (A. 32.) The Mediator's Report further states that "a second mediation shall be scheduled for April 10, 2020, but if the Johnsons' counsel notified the court that an inspection and appraisal were not completed by April 10, 2020, the Mediator's Report would become a final report, the second mediation would be cancelled, and the case would return to the docket." (A. 30.)

The Ellsworth District Court scheduled a second mediation for April 10, 2020. (A. 4.) The second mediation never took place. In the following days, the COVID-19 pandemic hit the State of Maine, and on March 13, 2020 the Maine Supreme Judicial Court issued an emergency order continuing all foreclosure cases indefinitely. (A. 4; *see also* Notice, Mar. 17, 2020.) On March 17, 2020, in accordance with the emergency order, the Ellsworth District Court issued a Notice to the parties postponing the second mediation to an undetermined date. (A. 4; *see also* Notice, Mar. 17, 2020.) This Notice instructed that"[i]f your case has been scheduled for a hearing or conference, do not come to the court or call the court," and "[y]ou will be notified by mail as soon as your case can be re-scheduled." (Notice, Mar. 17, 2020.)

The Court never rescheduled the second mediation. (A. 1-6.) The Johnsons' attorney never notified the court that property inspection or appraisal had not taken place, or otherwise requested that mediation be terminated. (A. 1-6.) The court never issued an order terminating mediation. (A. 1-6.) The court never issued a scheduling order. (A. 1-6.) Nothing occurred on the docket for more than 12 months, until July 15, 2021, when the Ellsworth District Court transferred the case back to the Calais District court. (A. 4.)

Following the transfer, Clerk's staff at the Calais District Court corresponded internally about whether to schedule a second mediation. (Email

Chain, July 19-20, 2021.) This email exchange was printed out and placed into the Clerk's public case file. (*Id*.) The email exchange states that the second mediation was never held due to the Supreme Judicial Court's COVID-19 continuance, and nothing further was filed with the court. (*Id*.) The Calais District Court did not schedule a second mediation. (A. 1-6.)

On November 22, 2021, the Johnsons filed a Motion for Summary Judgment ("MSJ"). (A. 13-27.) In the MSJ, the Johnsons' claimed that the parties "engaged in court-sponsored mediation as part of this foreclosure case, but have failed to achieve a resolution of the case." (A. 18, 20, & 26 at ¶ 13.)

The trial court granted the MSJ on March 2, 2022. (A. 7-9.) The court found that mediation was "completed without resolution and was terminated by the court on April 10, 2020." (A. 8 at ¶ 11). Doe filed a timely notice of appeal from the order granting summary judgment.

STATEMENT OF THE ISSUES

1. Whether the trial court erred by finding that the essential element of a foreclosure judgement that there is proof of completed mediation was satisfied pursuant to 14 M.R.S. § 6321-A and statewide foreclosure mediation program rules when (A) a second mediation session could not be held due to a COVID-19 continuance, mediation was never terminated by the court, and the case had not returned to the docket, and (B) the mediator's report indicates that the parties

agreed to participate in a second mediation unless the Johnsons' attorney requested that the mediation be terminated, which he did not request.

SUMMARY OF ARGUMENT

To ensure that Maine homeowners can access the critical legal protections the FDP provides, this Court has repeatedly held that "proof of completed mediation" is a necessary element of a judgement of foreclosure, when mediation is not waived or defaulted by the defendant. *Bank of America, N.A. v. Greenleaf,* 2014 ME 89, ¶ 18, 96 A.3d 700; *see also Higgins,* 2009 ME 136, ¶ 11. The record is clear that Doe requested FDP mediation, and never waived or defaulted his right to FDP mediation, so court should only grant summary judgement if FDP mediation is complete.

Doe and the Johnsons were scheduled to participate in a second mediation before the case was continued indefinitely due to COVID-19. The second mediation was never rescheduled and the case remained in mediation. (A. 1-6.). The trial court never issued an order terminating mediation, never issued a scheduling order, and never issued an order returning the case to the regular docket. (*Id*.) Furthermore, the Johnsons and Doe agreed to participate in a second mediation unless the Johnsons notified the court by April 10, 2020 that mediation should be terminated. (A. 30.) The Johnsons never made such a notification or

otherwise requested that mediation be terminated, which Doe would have opposed due to the COVID-19 continuance.

Therefore the trial court erred when it found that mediation had been completed. Because Maine foreclosure rules require mediation to be completed before granting a judgment of foreclosure, the court should vacate the judgment and remand the case with instructions to complete mediation and, if the case is not resolved in the FDP, to issue a Rule 16A scheduling order. *See* 14 M.R.S. § 6321-A; M.R. Civ. P. 56(j) & 93(d)(1); *Bank of America, N.A. v. Greenleaf,* 2014 ME 89, ¶ 18, 96 A.3d 700.

ARGUMENT

I. THE COURT ERRED BY FINDING THE PARTIES COMPLETED MEDIATION

This Court "review[s] a grant of a motion for summary judgment de novo, 'viewing the evidence in the light most favorable to the party against whom judgment has been entered." *Chase Home Finance LLC v. Higgins*, 2009 ME 136, ¶ 10, 985 A.2d 508 (citation omitted). This Court has "repeatedly noted the importance of applying the summary judgment rules strictly in the context of mortgage foreclosures." *HSBC Bank USA, N.A. v. Gabay*, 2011 ME 101, ¶ 9, 28 A.3d 1158.

Here, the summary judgment record is clear that FDP mediation was never completed. Therefore, the trial court erred by finding the parties completed FDP mediation and granting summary judgment.

A. Completion of FDP Mediation Is a Prerequisite to a Judgment for Foreclosure.

In a residential foreclosure action, it is mandatory under 14 M.R.S. § 6321-A that the court refers the parties to mediation in the FDP when the residence has four units or fewer and when the defendant returns a one-page form request for FDP mediation served with the complaint. 14 M.R.S. § 6321-A(2) & (6); *see also* M.R. Civ. P. 93(c).

The Maine Legislature created the FDP in 2009 in response to a statewide foreclosure crisis. *State of Maine Judicial Branch Foreclosure Diversion Program,* Report to the Joint Standing Comm. on Health Coverage, Ins. & Fin. Servs. & the Joint Standing Comm. on Judiciary, 129th Legis., pg. 1 (Feb. 14, 2020) ("2020 FDP Report"), *available at* https://legislature.maine.gov/doc/5707. The FDP was designed to avoid unnecessary foreclosures by giving homeowners a meaningful opportunity to access alternative resolution programs. *Id* at 1. The program is designed to be accessible even to unrepresented defendants, requiring them only to fill out and return a one-page form explaining the program "written in language that is plain and readily understandable." 14 M.R.S. § 6321-A(2). The program also provides parties with a trained third-party mediator, and is financed by a filing fee paid by the plaintiff upon commencing a foreclosure action. 14 M.R.S. § 6321-A(7). The FDP in Maine has proven successful, resulting in the resolution and voluntary dismissal of 61 percent of cases mediated between 2009 and 2020. 2020 FDP Report at 5. For defendants facing foreclosure, FDP mediation is "part of the framework of substantive rights" established by 14 M.R.S. § 6321-A. *HSBC Bank USA, N.A. v. Lombardo*, No. 2:19-cv-00291-NT, 2020 WL 6136213, at *10 (D. Me. Oct. 19, 2020).

Once a case is referred to mediation, 14 M.R.S. § 6321-A(12) requires that parties make a "good faith effort" to mediate all issues. The requirement is such

that conduct does not have to rise to the level of "bad faith" to violate the statute, a "lack of good faith" is sufficient to violate the standard. *U.S. Bank N.A. v. Sawyer*, 2014 ME 81, ¶15, 95 A.3d 608.

Pursuant to 14 M.R.S. § 6321-A(3), the Supreme Judicial Court issued rules implementing the FDP statute, which were adopted as Rule 93. M.R. Civ. P. 93. The rules are clear that actions of foreclosure referred to mediation are put on hold until mediation is completed. Critically, M.R. Civ. P. 93(d)(1) provides that "no dispositive motions or requests for admissions shall be filed until five days after mediation is completed and a final mediator's report is filed with the court, or until the court orders that mediation shall not occur." M.R. Civ. P. 93(d)(1). Rule 56, which governs summary judgement, was also amended in 2009 to require that a court may not enter summary judgement in a foreclosure action "except after review by the court and determination that . . . mediation, when required, has been completed or has been waived or the defendant, after proper service and notice, has failed to appear or respond and has been defaulted or is subject to default." M.R. Civ. P. 56(j).

Critically, foreclosure actions in mediation do not return to the regular docket until mediation is completed. *Lombardo,* 2020 WL 6136213, *2 ("If mediation is not successful, the case is returned to the court's docket, and the litigation progresses."). That foreclosure actions do not return to the docket until

mediation is complete is also clear from the fact that Rule 93 explicitly outlines the ways in which parties can move to end mediation and return to the docket. First, a defendant can freely request that their right to mediation be waived. M.R. Civ. P. 93(m). Second, if a defendant fails to appear for mediation, the court can issue an order ending mediation and "return[ing] the case to the regular court docket." M.R. Civ. P. 93(c)(5). Third, if a defendant refuses to provide information necessary to review their loan for a possible workout, the plaintiff's attorney can "file a written motion with the court, with a copy to the defendant, requesting that the case be returned to the regular docket because the defendant has failed to provide the requested information." *Id*.

The need for mediation to complete before a foreclosure action progresses is so important that this court has repeatedly held that "proof of completed mediation" is a necessary element to obtain a judgement of foreclosure. *Bank of America, N.A. v. Greenleaf,* 2014 ME 89, ¶ 18, 96 A.3d 700; *see also Higgins,* 2009 ME 136, ¶ 11. Like any other statutory requirement for a foreclosure judgment, a plaintiff must demonstrate "strict compliance" with 14 M.R.S. § 6321-A and M.R. Civ. P. 93. *See Camden Nat'l Bank v. Peterson*, 2008 ME 85, ¶ 21, 948 A.2d 1251 ("For a mortgagee to legally foreclose, all steps mandated by statute must be strictly performed."); *see also Greenleaf,* 2014 ME 89, ¶ 31

(observing that "foreclosure plaintiffs must strictly comply with all statutory foreclosure requirements").

B. Because The Parties Never Completed FDP Mediation, The Trial Court Should Not Have Granted Summary Judgment.

In this case, it is undisputed that Doe has never waived his right to mediation or failed to appear at a scheduled mediation session. Therefore, to obtain a judgement of foreclosure, the Johnsons had the burden to prove strict compliance with the FDP requirements in 14 M.R.S. § 6321-A and Rule 93, including that mediation was completed. *See Higgins,* 2009 ME 136, ¶ 11. Construing the facts in the light most favorable to Doe, the trial court erred by finding that the FDP requirements were strictly met, and thereby denied Doe the substantive protections offered by the FDP.

Rule 93 precludes the Johnsons from filing an MSJ until mediation is complete and a final mediator's report is filed with the court, or alternatively, until the court orders that mediation is terminated. M.R. Civ. P. 93(d)(1). Contrary to representations made by the Johnsons in their MSJ, the parties never completed the FDP mediation process. (A. 20 at ¶ 13.) No final mediator's report was filed and the District Court never entered an order terminating mediation.

The mediator's report from the parties' first mediation on March 6, 2020 indicates a clear agreement that the parties would "work together to obtain a property inspection and appraisal" and that the parties would hold a second

mediation session on April 10, 2020. (A. 30, 32.). The parties made a further agreement to participate in a second mediation session unless the Johnsons' attorney notified the court that an inspection and appraisal were not completed by April 10, 2020, in which case the mediator's report would become a final report, the second mediation would be cancelled, and the case would return to the docket. (A. 30.)

The District Court issued a scheduling notice for the April 10, 2020 second mediation, but well before that mediation could occur the court postponed all mediations indefinitely due to the onset of the COVID-19 Pandemic. (A. 4; Notice, March 17, 2020.) Because the Johnsons' attorney never filed a request with the Court that the second mediation be terminated, and because the Court never issued an order cancelling the second mediation or otherwise removing the case from the FDP, then pursuant to both Rule 93 and the parties' mediation agreement, the case remained in mediation. In other words, no event that could have triggered a termination of mediation ever occurred.

An objective review of the subsequent procedural history of the case confirms the fact that mediation never ended. The March 17, 2020 Notice continuing the second mediation expressly instructs the parties that the mediation will be rescheduled, and not to "come to the court or call the court." (Notice, Mar. 17, 2020.) The Notice advises the parties that "[y]ou will be notified by mail as

soon as your case can be re-scheduled." (*Id.*) In the meantime, nothing in the case indicated mediation terminated. Internal communications between court clerk staff observed that the case still required further mediation. (Email Chain, July 19-20, 2021.) Notably, the court never issued a scheduling order, which is the typical practice when mediation completes and the case "returns to [the] docket." (A. 4, 30.)

While Doe waited for the District Court to reschedule a second FDP mediation, the Johnsons filed their MSJ. The filing of the MSJ before mediation had terminated is an unequivocal violation of Rule 93(d)(1). Moreover, the Johnsons' filing of the MSJ without first seeking the termination of FDP mediation and before the Court terminated FDP is a breach of duty to mediate in good faith imposed by 14 M.R.S. § 6321-A(12) and Rule 93(j). The Johnsons agreed in the first mediation to participate in a second mediation unless they requested the cancellation of the second mediation. (A. 30.) By filing the MSJ without first participating in a second mediation or seeking termination of mediation, the Johnsons broke that promise, which is a recognized breach of the duty of mediating in good faith. *See Sawyer*, 2014 ME 81, at ¶¶ 15-17 (finding mortgagee's breach of mediation agreements constitutes violation of the good faith duty).

Viewing these facts in the light most favorable to Doe, it is clear that FDP mediation had not completed, and like many others put on hold during the pandemic, was awaiting scheduling. The trial court, therefore, erred by finding that mediation had completed and was terminated by the court on April 10, 2020. (A. 8 at ¶ 11.) Because this essential element of a foreclosure judgment was not satisfied, this Court should vacate the judgment and remand the case with instruction to refer the matter for further mediation in the FDP, and if mediation does not resolve the case, to issue a scheduling order to govern any post-mediation procedures.

CONCLUSION

For these reasons, the trial court erred in finding that the FDP mediation process was completed. Accordingly, this Court should vacate the judgement and remand the matter for further appropriate proceedings.

Respectfully submitted,

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BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2016**
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Date of JD/LLB	**June 7, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 17, 2023

The Honorable P. Casey Pitts
U.S. District Court for the
Northern District of California
280 South 1st Street
San Jose, CA 95113

Dear Judge Pitts:

I write to apply to serve as your clerk in 2023-2024 or any subsequent term. I received my JD, with highest pro bono distinction, from Stanford Law in June of 2022. I have strong family ties to the Bay Area, and my clerkship search is limited to the Northern District of California. I believe my academic resume makes me an excellent fit for this position, and that my background as an immigrant and first-generation college graduate will allow me to contribute to the diversity of your staff.

At Stanford, I consistently sought out opportunities to gain hands-on experience with the law. I wrote and argued motions on behalf of the San Mateo County Counsel's office and the San Jose Record Clearance Project, and led the Stanford Animal Law Pro Bono Program, which performs legal research for impact litigation efforts under the Endangered Species Act and various state laws. I was a teaching assistant to the Oral Argument Workshop, and aided Dr. Wise in his duties as the Central District's special monitor to the *Flores v. Reno* settlement agreement. I received the John Hart Ely prize in patent law and contributed to Masur & Ouellette's *Patent Law: Cases, Problems, and Materials* as a research assistant to Professor Lisa Ouellette.

I worked at Durie Tangri through 2022, and have recently joined Keker, Van Nest and Peters, where I am building a practice in intellectual property and general commercial litigation. I hope that this clerkship will allow me to contribute positively to your chambers' administration of justice and continue to develop my legal writing and reasoning.

Please find enclosed my resume, list of references, law school transcript, and writing sample. Professors Lisa Ouellette, Mark Lemley, and Diego Zambrano are providing letters of recommendation in support of my application. Letters are available upon request from the Stanford Clerkship Office. A list of additional references is attached to my resume.

I welcome the opportunity to discuss my qualifications further. I am available to meet in person, by phone, or by videoconference. Thank you for your consideration.

Sincerely,
Hayk Esaghoulyan

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EDUCATION

STANFORD LAW SCHOOL Stanford, CA
J.D., *highest pro bono distinction*, June 2022
Honors: John Hart Ely Prize for Outstanding Performance – IP Law: Patents
Activities: Senior Editor, *Stanford Law and Policy Review*
Pro Bono Leader, Stanford Animal Protection Project (SAPP)
President, Stanford Animal Law Society
Advocacy Chair, Stanford Advocates for Immigrants' Rights (SAIR)
Volunteer, Tax Pro Bono Project
Volunteer, San Jose Record Clearance Project

YALE UNIVERSITY New Haven, CT
M.A., European and Russian History, June 2018
Awards: Foreign Language and Area Studies (FLAS) Fellow, French (2016-17); Dutch (2017-18)
Thesis: *Reading "The Life and Adventures of Joseph Emin" as Enlightenment Text*
Published Research: *White Faced Rajahs: Race and the Making of the Nabob in British and Irish Newspapers and Periodicals* (Conference Paper, Scuola Normale Superiore di Pisa, Dec. 2017)

UNIVERSITY OF CALIFORNIA, LOS ANGELES (UCLA) Los Angeles, CA
B.A., History, *summa cum laude*, May 2016
Honors: Highest Departmental Honors – History.
Thesis: *"Driven by the Wind of Migration": New Perspectives on Armenian and Greek Print in the Dutch Republic*

SANTA MONICA COMMUNITY COLLEGE (SMC) Santa Monica, CA
Transfer, 2011-2013
Activities: Founder and Secretary, SMC History Club

EXPERIENCE

KEKER, VAN NEST & PETERS, LLP San Francisco, California
Associate March 2023 – Present

- Prepared motions in patent litigation: motions to strike damages theories and expert declarations, motions for, and in opposition to, summary judgment.
- Drafted motion to compel and motion for injunction pending appeal in contract dispute.
- Developed case strategy in patent cases: conducted prior art searches, interviewed client engineers, drafted non-infringement and invalidity positions, and worked to prepare experts and expert reports.

DURIE TANGRI, LLP San Francisco, California
Associate September 2022 – January 2023

- Prepared firm's first *ex parte reexamination* request in patent matter.
- Prepared non-infringement and invalidity arguments in various patent matters; drafted corresponding sections of answers, countercomplaints.

STANFORD LAW SCHOOL Stanford, California
Research Assistant to Lisa Larrimore Ouellette June 2021 – September 2021

- Line edited Masur & Ouellette's *Patent Law: Cases, Problems, and Materials*. Drafted portions of accompanying teaching supplement.

Research Assistant to Paul H. Wise January 2022 – June 2022

- Assisted Dr. Wise, Professor of Child Health and Society, in his duties as the CD Cal. appointed special monitor for the *Flores* Agreement, which provides basic standards regarding care and release of immigrant children detained by CBP.
- Prepared memos arguing novel legal theories that may support expansion of child welfare standards beyond the minimums provided for by statute and the *Flores* agreement.

Teaching Assistant to Randee Fenner March 2022 – June 2022

- Assisted in teaching of Oral Argument Workshop. Selected cases to be argued, prepared student attorneys, and sat as chief judge of the bench. Questioned counsel and provided student attorneys with feedback.

QUINN EMANUEL URQUHART& SULLIVAN, LLP Redwood Shores, California
Summer Associate June 2021 – September 2021

- Drafted an opposition to motion to dismiss in pro bono §1983 false arrest and excessive force case.
- Drafted legal memos concerning claim construction, non-obviousness, and novelty for a patent case in the Western District of Texas and an associated IPR proceeding.
- Prepared memos on legal theories and client pitch documents for prospective cannabis trademark litigation and various copyright suits.

SAN MATEO COUNTY COUNSEL'S OFFICE Redwood City, California
Law Clerk June 2020 – September 2020

- Prepared legal memos for county attorneys regarding a wide range of legal questions, including procedural and evidentiary issues, juvenile court claims, and Fourth Amendment §1983 claims.
- Drafted briefs for jurisdictional hearings during juvenile dependency proceedings on behalf of Children and Family Services.
- Wrote first and final drafts of a demurrer and motion for sanctions in response to a negligence suit brought by a county employee under the California Tort Claims Act.

CENTER FOR MIGRATION STUDIES OF NEW YORK New York, NY
Intern August 2018 – January 2019

- Line and copy-edited CMS's peer-reviewed journal, the *International Migration Review*, and CMS's online secondary journal, *Journal on Migration and Human Security*.
- Conducted outreach in the Midwest region for "Mapping Statelessness in the United States," a nationwide survey effort in partnership with the UNHCR.

CONNECTICUT INSTITUTE FOR REFUGEES AND IMMIGRANTS (CIRI) Bridgeport, CT
Legal Services Intern August 2018 – December 2018

- Interviewed clients, researched and drafted motions for emergency stays of removal alongside supervising legal representatives.
- Monitored U-visa cases, reviewed case records, requested and compiled necessary documents from local police departments and district attorneys.

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—— Stanford Degrees Awarded ——

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Confer Date : 06/12/2022
Plan : Law

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Program : Law JD
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Completed Program

—— Beginning of Academic Record ——

2019-2020 Autumn

Course		Title	Attempted	Earned	Grade
LAW	201	CIVIL PROCEDURE I Diego Zambrano	5.00	5.00	H
LAW	205	CONTRACTS Barbara Fried	5.00	5.00	H
LAW	219	LEGAL RESEARCH AND WRITING Yanbai Andrea Wang	2.00	2.00	P
LAW	223	TORTS John Donohue	5.00	5.00	P
LAW	240C	DISCUSSION (1L): CORPORATE SOCIAL RESPONSIBILITY Michael Callahan; Paul Brest	1.00	1.00	MP

2019-2020 Winter

Some winter LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

Course		Title	Attempted	Earned	Grade
LAW	203	CONSTITUTIONAL LAW Pamela Karlan	3.00	3.00	MPH
LAW	207	CRIMINAL LAW Lawrence Marshall	4.00	4.00	MPH
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK Elizabeth Gropman	2.00	2.00	MPH
LAW	2401	ADVANCED CIVIL PROCEDURE Diego Zambrano	3.00	3.00	MPH

2019-2020 Spring

All spring LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

Course		Title	Attempted	Earned	Grade
LAW	217	PROPERTY Michelle Anderson	4.00	4.00	MPH
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE Elizabeth Gropman	2.00	2.00	MPH
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION Robert Weisberg	4.00	4.00	MPH
LAW	2402	EVIDENCE David Sklansky	4.00	4.00	MPH

2020-2021 Autumn

Course		Title	Attempted	Earned	Grade
LAW	1029	TAXATION I Joseph Bankman	4.00	4.00	H
LAW	4005	INTRODUCTION TO INTELLECTUAL PROPERTY Lisa Ouellette	4.00	4.00	P
LAW	4007	INTELLECTUAL PROPERTY: COPYRIGHT Paul Goldstein	3.00	3.00	H

2020-2021 Winter

Course		Title	Attempted	Earned	Grade
LAW	1027	SECURITIES REGULATION: CAPITAL FORMATION FROM START-UP TO IPO AND BEYOND Joseph Grundfest	4.00	4.00	P
LAW	4029	VIDEO GAME LAW Mark Lemley; Sonali Maitra	3.00	3.00	H
LAW	7001	ADMINISTRATIVE LAW David Freeman Engstrom	4.00	4.00	P

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2020-2021 Spring

Course		Title	Attempted	Earned	Grade
LAW	4010	INTELLECTUAL PROPERTY: PATENTS	3.00	3.00	H
Transcript Note:		John Hart Ely Prize for Outstanding Performance			
		Lisa Ouellette			
LAW	6003	THE AMERICAN LEGAL PROFESSION	3.00	3.00	H
		Robert Gordon			
LAW	7816	ADVANCED LEGAL WRITING: LITIGATION	3.00	3.00	MP
		Lisa Pearson			
LAW	7826	ORAL ARGUMENT WORKSHOP	2.00	2.00	MP
		Randee Fenner			

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	P
		Robert Weisberg			
LAW	4012	INTELLECTUAL PROPERTY: TRADEMARKS	3.00	3.00	H
		Mark Lemley			
LAW	7828	TRIAL ADVOCACY WORKSHOP	5.00	5.00	MP
		Sallie Kim; Sara Peters; Timothy Hallahan			

2021-2022 Winter

Course		Title	Attempted	Earned	Grade
LAW	2519	WATER LAW	3.00	3.00	H
		Barton Thompson			
LAW	5010	INTERNATIONAL HUMAN RIGHTS	3.00	3.00	H
		Penelope Van Tuyl			
LAW	7059	LABOR LAW	3.00	3.00	P
		William Gould			

2021-2022 Spring

Course		Title	Attempted	Earned	Grade
ENERGY	301	THE ENERGY SEMINAR	1.00	1.00	S
		John Weyant			
HISTORY	195C	MODERN JAPANESE HISTORY: FROM SAMURAI TO POKEMON	5.00	5.00	A
		Jun Uchida			
LAW	2403	FEDERAL COURTS	4.00	4.00	P
		Jeffrey Fisher			
LAW	7041	STATUTORY INTERPRETATION	3.00	3.00	P
		G. Snyder			

END OF TRANSCRIPT

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Office of the University Registrar
Stanford University
Stanford, California 94305-6032

Grade point average and rank in class are not computed and are not available. Four grading systems are used at Stanford University. The general University grading system is used in all courses except those taught in the School of Law, the Graduate School of Business, or to M.D. students in the School of Medicine.

Unit of Credit: Every unit for which credit is given is understood to represent approximately three hours of actual work per week for the average student. Thus, in lecture or discussion work, for 1 unit of credit, one hour per week may be allotted to the lecture or discussion and two hours for preparation or subsequent reading and study. Where the time is wholly occupied with studio, field, or laboratory work, or in the classroom work of conversation classes, three full hours per week through one quarter are expected of the student for each unit of credit; but, where such work is supplemented by systematic outside reading or experiment under the direction of the instructor, a reduction may be made in the actual studio, field, laboratory, or classroom time as seems just to the department.

Academic programs include a status effective the day the transcript was printed. Stanford University uses the following program statuses:

Active: Student is currently active in the program indicated.

Leave of Absence: Student is currently on an official leave of absence from active study.

Completed: Student program requirements have been met and the degree has been awarded (degree programs only).

Discontinued: Student no longer enrolled in program (includes post-doctoral scholars whose appointments have ended).

Dismissed: Student was dismissed from the University.

Cancelled: Student deceased while enrolled and program cancelled or student administratively withdrawn for cause.

CHRONOLOGY OF GENERAL UNIVERSITY GRADING SYSTEM

Current (effective Summer Quarter 2008-09):

A (+,-)	Excellent
B (+,-)	Good
C (+,-)	Satisfactory
D (+,-)	Minimal Pass
NP	Not Passed
CR	Credit (student-elected satisfactory: A, B, or C equivalent)
S	No-option Satisfactory (A, B, or C equivalent)
NC	No Credit (unsatisfactory performance, D+ or below equivalent)
I	Incomplete
L	Pass, letter grade to be reported
N	Continuing Course
RP	Repeated Course
GNR	Grade Not Reported
W	Withdrew

Note: The notation * was changed to GNR (Grade Not Reported).

Spring Quarter 2019-20: All undergraduate and graduate courses graded Satisfactory/No Credit (S/NC).

Effective Autumn Quarter 1995-96:

A (+,-)	Excellent
B (+,-)	Good
C (+,-)	Satisfactory
D (+,-)	Minimal Pass
NP	Not Passed
CR	Credit (student-elected satisfactory: A, B, or C equivalent)
S	No-option Satisfactory (A, B, or C equivalent)
NC	No Credit (unsatisfactory performance, D+ or below equivalent)
I	Incomplete
L	Pass, letter grade to be reported
N	Continuing Course
RP	Repeated Course
*	No Grade Reported
W	Withdrew

Autumn Quarter 1994-95: RP was introduced to replace the original grade for a course later retaken. The grade of I (incomplete) was changed to automatically lapse to NP or NC after one year.

Effective Autumn Quarter 1989-90:

A (+,-)	Exceptional Performance
B (+,-)	Superior Performance
C (+,-)	Satisfactory Performance
D (+,-)	Minimal Pass
L	Pass, letter grade to be reported
+	Satisfactory, student elected (A, B, or C)
S	Satisfactory, no option (A, B, or C)
N	Continuing Courses
*	No Grade Reported
I	Incomplete

Note: The P notation has been changed to S (Satisfactory). The lowest acceptable grade for either S or '+' is now C-.

Effective Autumn Quarter 1975-76:

A (+,-)	Exceptional Performance
B (+,-)	Superior Performance
C (+,-)	Satisfactory Performance
D (+,-)	Minimal Pass
L	Pass, letter grade to be reported
+	Pass, student elected (A, B, C, or D)
P	Pass, no option (A, B, C, or D)
N	Continuing Courses
*	No Grade Reported
I	Incomplete

Note: Under this system, Stanford restored the D grade, defining it as 'Minimal Pass.' Pass notations ('+' and P) were redefined to encompass all passing grades, A through D.

Summer Quarter 1972-73: P was introduced to denote pass in a course offered only pass/no credit at the option of the instructor.

Spring Quarter 1971-72: '+' and '-' as grade modifiers were reintroduced for all students.

Autumn Quarter 1971-72: '+' and '-' as grade modifiers were reintroduced for graduate students.

Effective Autumn Quarter 1970-71:

A	Exceptional Performance
B	Superior Performance
C	Satisfactory Performance
L	Pass, letter grade to be reported
+	Pass, student elected (A, B, or C)
N	Continuing Course
*	No Grade Reported
I	Incomplete

Note: The grades A, B, C, and '+' were redefined: D, E, F, W, and '-' were dropped from the grading system. Under the prior system, the University maintained records of all courses a student attempted. But under the revised system, the only courses recorded were those that were successfully completed or for which an I (incomplete) grade was given. The revised system also allowed a student or instructor to request the deletion of an I grade from a student's record if the student did not meet the requirements of the course within the time limit determined by the instructor. The use of the modifying suffixes '+' and '-' appended to letter grades was discontinued.

Effective Autumn Quarter 1963-64:

A	Excellent
B	Good
C	Satisfactory
D	Minimum Credit
E	Conditioned
F	Failed
N	Continuous Course
W	Unauthorized Withdrawal
I	Incomplete
*	No Grade Reported
+	Passed Without Defining Grade
-	Failed Course Taken Pass/Fail

Prior to Autumn Quarter 1963-64:

A	Excellent
B	Good
C	Fair
D	Barely Passed
E	Conditioned
F	Failed
N	Continuous Course
W	Unauthorized Withdrawal
I	Incomplete
*	No Grade Reported
+	Passed Without Defining Grade
-	Failed Course Taken Pass/Fail

CHRONOLOGY OF THE SCHOOL OF LAW GRADING SYSTEM

Effective Autumn Quarter 2009-10, units earned in School of Law are quarter units. Units earned in School of Law prior to 2009-10 are semester units.

Current (effective Autumn 2008-09):

H	Honors (exceptional work, significantly superior to the average performance at the school)
P	Pass (successful mastery of the course material)
R	Restricted Credit (work that is unsatisfactory)
F	Fail (work that does not show minimally adequate mastery of the material)
MP	Mandatory Pass (representing P or better work)
MP-H	Mandatory Pass – Public Health Emergency (effective during the 2020 global pandemic)
N	Continuing Course
I	Incomplete
*	No Grade Reported
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

Spring Quarter 2019-20: All Law courses graded Mandatory Pass-Health (MPH/F).

Note: Under this grading system, in 2008-09 third-year J.D. students remained under the prior grading system (below).

Effective Autumn 2001-02:

4.3, 4.2	A+
4.1, 4.0, 3.9	A
3.8, 3.7, 3.6, 3.5	A-
3.4, 3.3, 3.2	B+
3.1, 3.0, 2.9	B
2.8, 2.7, 2.6, 2.5	B-
2.2	Restricted Credit
2.1	Failure
I	Incomplete
K	Credit (student elected)
KM	Credit (mandatory)
RK	Restricted Credit
NK	Failure
N	Continuing Course
*	No Grade Reported

Note: The grading system was revised to a number system with letter equivalents and the grades of 2.3 and 2.4 (C+) were eliminated.

Effective Autumn 1983-84:

A+	4.3, 4.2
A	4.1, 4.0, 3.9
A-	3.8, 3.7, 3.6, 3.5
B+	3.4, 3.3, 3.2
B	3.1, 3.0, 2.9
B-	2.8, 2.7, 2.6, 2.5
C+	2.4, 2.3
R	2.2 (restricted credit)
F	2.1 (failure)
N	Continuing Course
I	Incomplete
*	No Grade Reported
K	Credit (student elected)
KM	Credit (mandatory)
RK	Restricted Credit

Note: The C, C-, D+, D and D- grades were eliminated. The grade of R (Restricted Credit) was introduced with the value of 2.2. The RK and F grades were redefined to a value of 2.2 and 2.1 respectively. Students may elect to take a limited number of courses on the K, RK, NK system. K shall be awarded for work that is comparable to numerical grades 4.3 - 2.3, RK for 2.2, an NK for 2.1.

Effective Autumn 1969: A second grading system was introduced with the following values:

K	Credit (1.7 - 4.3)
RK	Restricted Credit (0.9 - 1.6)
NK	No Credit (0 - 0.8)

Prior to Autumn 1969-70:

A+	4.3, 4.2
A	4.1, 4.0, 3.9
A-	3.8, 3.7, 3.6, 3.5
B+	3.4, 3.3, 3.2
B	3.1, 3.0, 2.9
B-	2.8, 2.7, 2.6, 2.5
C+	2.4, 2.3
C	1.9, 2.0, 2.1
C-	1.8, 1.7, 1.6, 1.5
D+	1.4, 1.3, 1.2
D	1.1, 1.0, 0.9
D-	0.8, 0.7, 0.6
F	0.0

Note: This system employs letter grades with numerical equivalents.

THE SCHOOL OF MEDICINE GRADING SYSTEM

The following grades are used in reporting on the performance of students in the M.D. program:

+	Pass. Indicates that the student has demonstrated to the satisfaction of the department or teaching group responsible for the course that s/he mastered the material taught in the course.
-	Fail. Indicates that the student has not demonstrated to the satisfaction of the department or teaching group responsible for the course that he or she has mastered the material taught in the course.
EX	Exempt. Course exempted by examination. No units granted.
N	Continuing Course
I	Incomplete
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

CHRONOLOGY OF THE GRADUATE SCHOOL OF BUSINESS GRADING SYSTEM

Current (Effective Autumn 2000-01):

H	Honors
HP	High Pass
P	Pass
LP	Low Pass
U	Unsatisfactory
EX	Course Exempted (does not affect grade point calculations)
+	Pass (LP or better)
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

Effective Autumn Quarter 1971-72:

H	Distinction. Work that is of markedly superior quality.
P+	Work that is of high quality and exceeds in a significant way all of the basic requirements of the course.
P	Pass. Work that is of good quality and clearly satisfies all the basic requirements of the course.
P-	Low Pass. Work that satisfies most of the basic require-ments of the course but is deficient in some minor way.
U	Unsatisfactory. Work that does not satisfy the basic requirements of the course and is deficient in significant ways.
EX	Course Exempted (does not affect grade point calculations)
+	Pass (P- or better)

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June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing in enthusiastic support of Hayk Esaghoulyan, an outstanding third-year student at Stanford Law School who has applied for a clerkship in your chambers. Hayk came to the United States as a child through a refugee resettlement program, and he has overcome numerous hardships to thrive as one of our most talented law students. I have had the opportunity to teach Hayk in two classes: Introduction to Intellectual Property in fall 2020 and Patent Law in spring 2021. Due to his top-notch performance in Patent Law—earning him the sole class prize—I invited him to work as a Research Assistant to help with the first edition of my patent law casebook. Through these interactions, I have seen that Hayk's intellectual capacity, writing skills, integrity, and work ethic are all extraordinary. I am confident that he will make a memorably good law clerk, and I recommend him without reservation.

Hayk's trajectory toward law school illustrates his exceptional talents. His family was forced to leave Iran in his early childhood and sought asylum for seven years before eventually resettling in LA. His parents were the first in their families to learn to read through their church and had difficulty earning enough to support his family; and he and his sister were the first to receive any formal education. He attended community college while working in construction and then transferred to UCLA, where he graduated with a 4.0 GPA. He then received a Master's at Yale in European and Russian History, where he received an Honors grade in all coursework, and his work included close readings of legal texts like notarial documents and maritime insurance contracts. He has now excelled at Stanford Law School, and I am confident that he will continue to flourish in his legal career.

I first taught Hayk in Introduction to Intellectual Property, which covers five different areas of IP law: trade secrets, utility patents, design patents, copyrights, and trademarks. To help absorb and synthesize all of this material in one quarter, students are required not only to complete heavy reading assignments, but also to participate in multiple-choice quizzes during class and to complete online assignments to acquaint them with practical aspects of searching for different forms of IP. Hayk was a stand-out class participant: he was always prepared when I called on him, and I could rely on him for clear and non-superficial answers. Because the pandemic required the class to be on Zoom, I did not get to know many of my students as well as usual, but Hayk was a regular attendee at office hours. I appreciated that his questions were less exam-centric than for many students—he demonstrated genuine intellectual curiosity about many of the thorny doctrinal issues raised by the cases we read.

Hayk's performance on the complex issue-spotter exam was strong, demonstrating beautiful writing and analytical skills. His score fell just below the Honors/Pass cutoff, not because of any mistakes in his analysis but because his trademark discussion focused on the relevant wordmarks and failed to discuss the potential trade dress claims. Unlike other top law schools with facially similar Honors/Pass grading systems, Stanford Law school uses a strict grading curve, with an inflexible cap on the percentage of students who can receive an Honors grade.

I was delighted that Hayk decided to enroll in Patent Law later that year. Patent Law is an advanced class that builds on the patent material from my Intellectual Property course. Hayk was again one of my favorite students in the course, and he was more adept than most of his classmates at drawing insightful connections with other areas of law and questioning some of patent law's underpinnings.

I wrote what I thought was my hardest exam yet, involving multiple patents on multiplex polymerase chain reaction—a technique for screening for multiple nucleic acid segments at once—to simultaneously test for multiple viruses (including COVID-19). The exam tested subtle issues related to doctrines such as functional claiming, patentable subject matter, active inducement, and lost profits, and most students got tripped up at some point of the analysis. But Hayk wrote a truly superlative exam that earned him the sole class prize.

Based on this performance, I asked Hayk if he might have time to work for me as a Research Assistant during his evenings and weekends that summer, in addition to his Summer Associate position at Quinn Emanuel—and I was very glad when he said yes. He provided invaluable help with the first edition of my patent law casebook. He provided detailed line-edits of the entire text, including not just corrections to citations and sentence-level wording, but also suggesting places where the text was unclear or could be improved. He also helped us write the accompanying teacher's manual, including drafting model answers to many of the practice problems included throughout the casebook. His work was first-rate, prompt, and generally required little revising.

Hayk has maintained his strong academic record while pursuing a variety of extracurricular activities beyond helping with my

casebook. He has conducted other work as a Research Assistant and Teaching Assistant, and he is an editor for the *Stanford Law and Policy Review*. He also has written and argued motions for the San Mateo County Counsel's office and the San Jose Record Clearance Project. He has written legal memos for his pro bono work with the Stanford Advocates for Immigrants' Rights and the Stanford Animal Protection Project. He is a deeply principled person with a real commitment to giving back to his communities.

As I hope is clear by now, I am one of Hayk's biggest fans, and I am confident that he will be a standout law clerk. He is tremendously gifted and a true pleasure to talk with. Please do not hesitate to be in touch if you have further questions; I am available on my cell phone at 610-715-7705.

Sincerely,

/s/ Lisa Ouellette

Lisa Ouellette - ouellette@law.stanford.edu - 650-721-2928

June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to recommend Hayk Esaghoulyan for a clerkship in your chambers. Hayk has a strong record of 8 Honors grades in 14 graded classes, including the John Hart Ely Prize for outstanding performance in Intellectual Property: Patents. He has this record even though Stanford has a harsher grade curve than its peer schools. Hayk is involved in extracurricular activities at the law school, including the Stanford Journal of Law and Policy, the Animal Law Society (as President), and other public interest activities. This is a very good package. I've seen Hayk's intelligence in my Civil Procedure and Advanced Civil Procedure classes and believe he would be a hard worker and a good clerk.

Hayk is a professional and hardworking student. The first thing to highlight is that Hayk received an Honors grade in my Civil Procedure Class. There, he was always on top of the material, engaged in class discussions, and professional. Most importantly, I've seen his quality writing myself in our exam. I can tell you that his exam was very good, placing at the top of the class, easily winning him an Honors grade. Hayk was one of the only students to successfully spot all important issues and untangle the complex web of facts and arguments that I presented in the exam. He displayed careful, clear, and easy-to-understand writing. He carefully waded through every exam question, incisively analyzing specific language from the federal rules, as well as cases applying the rules.

Again, Hayk was also an excellent presence in the classroom, always prepared and engaged with the material. Hayk is unfailingly polite and professional. He arrived in class on time, asked smart questions, and treated classmates with respect.
It's important to also highlight that Hayk is involved with pro-bono, public interest, and other activities at the law school. Hayk has told me about his work for the Animal Protection Project, where he has prepared legal memos for ALDF in support of litigation against pet stores engaging in "pet leasing." He has also worked with PETA in support of Endangered Species Act litigation targeting roadside zoos owned by Joseph "Tiger King" Maldonado-Passage and associates. Similarly, Hayk worked on memoranda for the Stanford Advocates for Immigrants' Rights (SAIR) on issues related to immigration non-profits.

Hayk's personality and professional package is rounded out by a deep sense of decency likely rooted in his immigrant family background. Hayk's parents immigrated to the United States from Iran. As an immigrant myself, I know how difficult the transition process can be. But as a first-generation American, Hayk has put amazing performances in every institution. His immigrant background has shaped some of his work. For instance, Hayk has told me about his master's degree at Yale, where he conducted archival research in the Dutch National Archives on notarial documents relating to Iranian and Greek traders resident in Amsterdam in the 17th century. He is someone with a wide-ranging mind, deeply interested in history.

The bottom line is Hayk is a devoted law student; polite; smart; and a hard worker. I believe this would make him a solid clerk in your chambers.

Sincerely,

Diego A. Zambrano

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June 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to recommend my former student Hayk Esaghoulyan for a clerkship in your chambers. I recommend him very highly.

Hayk comes to law school from a very non-traditional path. He was born in Iran, where members of his religious minority were persecuted and had to flee. He lived in Russia and elsewhere for years while his family sought asylum before ultimately settling in the United States. He is the first in his family to attend college and his parents were the first in his family to learn to read.

From those humble beginnings, he managed to attend community college in California, transfer to UCLA, where he graduated with highest honors, and then obtained a masters degree from Yale before coming to Stanford Law School. He has excelled here at Stanford, earning an Honors grade in a substantial majority of his classes (including both my Trademarks class and my seminar in Video Game Law). Unlike Harvard and Yale, Stanford strictly limits the number of Honors grades we can give in any class; Hayk's overall record puts him quite high in the class. Hayk is not overly outspoken in class, but when he does participate he has useful things to say. And as I have gotten to know him outside of class his smarts and intellectual curiosity become clear.

Hayk wrote a very good research paper under my supervision focusing on the legal consequences of virtual "property" in video games and virtual worlds, including some unanticipated tax consequences. I have encouraged him to publish the paper.

While he has significant interests in intellectual property and technology law, his knowledge of the law is wide-ranging. He has been very active in immigration issues, and has done a ton of pro bono work, ranging from animal welfare issues to immigration to tax law. And he has worked for both a local government legal department and for the *Flores* special monitor in the Central District of California. His considerable energy and wide-ranging interests will serve him well in a district court clerkship. I was sufficiently impressed by Hayk that I encouraged him to join us at Durie Tangri, and he did. Unfortunately, that was last fall, just before the unfortunate demise of the firm. Like me, he chose not to follow the group to MoFo; he has accepted an offer at Keker.

I think Hayk will make a strong law clerk and I encourage you to take a close look at him.

Please don't hesitate to contact me if you have any questions.

Sincerely,

/s/ Mark A. Lemley

UNREVIEWED DRAFT SUBMITTED TO LAW 224B

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GISELLE AND KELLI SOMMER, citizens of Germany, on behalf of their minor daughter, ZEKI ERSOY, citizen of Germany, on behalf of her minor daughter, FARROQH BULSARA, citizen of Germany,

Plaintiffs,

v.

HIGHLANDS PHARMACEUTICALS, INC.,

Defendant.

Case No. 1:20-cv-12345-BH

DEFENDANT HIGHLANDS PHARMACEUTICALS, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DOCUMENTS

Hearing Date:
Time:
Dept.:
Judge:

TABLE OF CONTENTS

I. INTRODUCTION

Plaintiffs have brought a complaint alleging negligence, fraud, and strict liability in relation to Highlands' development and marketing of Dypreza. During discovery, Highlands inadvertently disclosed two documents, both designated work product in Highlands' privilege log, to Plaintiffs' counsel, who now challenge that designation. Both documents were prepared in anticipation of litigation by representatives of Highlands, reflect their mental impressions, opinions, and strategies, and are therefore work-product privileged. Plaintiffs have not met the high burden required to overcome that privilege, and this court should deny their motion to compel.

II. STATEMENT OF FACTS

On November 2, 2019, Highlands' Chief Legal Officer Mx. Veloz, recognizing an impasse in negotiations to lift a recent EMA recall of Dypreza, commissioned a new safety analysis of existing Dypreza user data from Dr. Johnson. High000279. In doing so, Veloz noted that "past recalls have led to lawsuits, so we want to assess our exposure as realistically as possible." High000281.

Mere weeks after Johnson completed his report, Plaintiffs brought the present complaint alleging negligence and fraud in developing and marketing Dypreza. Complaint ¶ 40-55. During discovery, a misspelling of "confidential" resulted in the production of both the correspondence between Veloz and Johnson (High000279-285), and the resulting report (High000293-301), despite their clear designation as work product in Highlands' privilege log. Fleschig Letter (Apr. 2, 2020).

Following an unproductive meet and confer, Plaintiffs refuse to return or destroy the documents in question and now seek to compel production of Highlands' work product in an improper effort to bolster their case with privileged documents unrelated to the issues presented by their claims.

III. ARGUMENT

The produced documents fall squarely within work-product protection, and the Court should deny Plaintiffs' motion to compel. The work-product doctrine provides two species of privilege—ordinary and opinion work-product privilege—intended to provide a "zone of privacy" within which lawyers, clients, and agents can "think frankly, critically, and creatively about litigation-

related matters." *JumpSport, Inc. v. Jumpking, Inc.*, 213 F.R.D. 329, 354 (N.D. Cal. 2003). Both the email chain and report are properly classified as work-product protected.

While work-product protection is not absolute, the requesting party must meet a high burden when seeking production of either species of work product: substantial need and undue burden for ordinary work product, or the greater "compelling need" showing for opinion work product. *JumpSport*, 213 F.R.D. at 335. Plaintiffs fail to meet either burden. Discovery of privileged documents will only serve to allow litigation on "borrowed wits," to the detriment of the adversarial system of litigation. *Id.*

A. Highlands' documents qualify as work product, and Plaintiffs' fail to meet the burden required to overcome that protection.

To qualify for work-product protection, documents "must have two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *In re California Pub. Utilities Comm'n*, 892 F.2d 778, 780-81 (9th Cir. 1989). Both the correspondence and report satisfy that finding and should be afforded protection from discovery.

1. Highlands' documents were prepared in anticipation of litigation.

The Ninth Circuit's "because of" test holds that a document prepared "in anticipation of litigation" is eligible for work-product protection if the document "can be fairly said to have been prepared or obtained because of the prospect of litigation." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 905-06 (9th Cir. 2004). The "because of" standard "does not consider whether litigation was a primary or secondary motive behind creation," only that, in light of the totality of the circumstances, the document "would not have been created in substantially similar form but for the prospect of that litigation." *Id*. at 907; *In re: Bard Ivc Filters Prod. Liab. Litig.*, No. 2641, 2016 WL 537587, at *3 (D. Ariz. Feb. 11, 2016) (extending work-product protection to documents that served to fulfill statutory and regulatory obligations regarding adverse event reporting because those documents also embodied a litigation purpose). The test weighs factors such as "the timing of retention of non-testifying experts in relation to the litigation at issue," and "whether the documents prepared by the retained experts were done so at the request

of counsel, and whether they were in turn submitted to a litigation team." *In re Experian Data Breach Litig.*, No. SACV1501592AGDFMX, 2017 WL 4325583, at *2 (C.D. Cal. May 18, 2017).

The Ninth Circuit test requires a showing of "reasonable anticipation," *not* that "litigation [was] imminent" or that a specific complaint was divined by defendants. *Bard*, 2016 WL 537587, at *4. Ninth Circuit courts have consistently found reasonable anticipation where a party has retained an expert due to notice of an increased litigation risk and has distributed resulting reports to counsel. *Id*. at *4; *Experian*, 2017 WL 4325583, at *2. In *Bard*, following notice of adverse events in relation to their products, producing party commissioned an expert to prepare a litigation risk assessment for those events, and litigation commenced shortly after. 2016 WL 537587, at *1. In *Experian*, the court extended work product protection where Experian, notified of a data breach, recognized the likelihood of subsequent litigation and had their counsel commission an expert analysis, which was provided to Experian's in-house counsel shortly before complaints were filed. 2017 WL 4325583, at *2.

Here, too, Veloz and Johnson were acting in response to clear notice of elevated litigation risks. Veloz, when retaining Johnson, noted that "past recalls have led to lawsuits, so we want to assess our exposure as realistically as possible," asking Johnson to "analyz[e] information relevant to Highlands' possible exposure." High000279-281(with regards to the present lawsuit, Veloz told Johnson "this was only a matter of time."). Further, Johnson's report was forwarded to outside counsel, and Veloz sought additional advice from Johnson the day after being served with the present suit. High000284. Anticipation of litigation informed the organization of the report, with Veloz asking that Johnson "break down the data from adverse event reports by categories [determined by relative exposure to legal risk]," because of her belief that minors and American users presented the greatest exposure to litigation. High000281. The memorandum would not have been created in substantially similar form but for the anticipation of litigation.

2. Both documents were prepared "by or for" representatives of Highlands.

Work-product doctrine is "an intensely practical one" that recognizes that "attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in

preparation for trial." *Nobles*, 422 U.S. at 239. Work product can be prepared by non-attorneys so long as it is prepared "by or for another party or its representative," including a party's "attorney, consultant, surety, indemnitor, insurer, or agent," Fed. R. Civ. P. 26(b)(3)(A), even when that representative is not working at an attorney's behest. *O'Connell v. Smith*, No. CV-13-01905-MWF, 2014 LEXIS 198901, at *11 (C.D. Cal. Aug. 4, 2014).

Both Veloz and Johnson fall within this Circuit's broad understanding of "representative." Veloz serves as both Chief Legal Officer and Executive Vice President & Corporate Secretary to Highlands. High000279-285; *O'Connell*, 2014 LEXIS 198901, at *11 (finding that employee serving as both attorney and executive is a "representative"). Johnson's retention as a consultant likewise places him squarely under the umbrella of a representative. High000281.

3. Plaintiffs cannot overcome ordinary work product protection.

Once the work-product privilege is found to apply, the burden shifts and the party seeking discovery must make the showing required to overcome work product protection. *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003). The Ninth Circuit employs a three-prong test, considering "1) whether there is 'substantial need' for the work product . . . 2) whether substantially equivalent information can be obtained from another source; and 3) whether doing so would create an undue hardship (not merely expense or inconvenience) for the party seeking discovery." *Fletcher v. Union Pac. R.R. Co.*, 194 F.R.D. 666, 671 (S.D. Cal. 2000). Plaintiffs fail to meet their burden on each count.

1) Plaintiffs do not have substantial need for the requested documents.

Substantial need for work product "is demonstrated by establishing that the facts contained in the requested documents are essential elements of the requesting party's prima facie case." *Cont'l Circuits*, 2020 WL 416109, at *4. Plaintiffs advance negligence, fraud, and products liability failure to warn claims, centered on Highlands' alleged failure to conduct pre-clinical trials, concealment of those failures, and provision of inadequate warnings to physicians and their patients. Compl. ¶40-55. Plaintiffs' claims center the knowledge and state of mind of Highlands, Johnson, and the University of Medford from the time of Dypreza's development, beginning in 2007, through various pre-clinical and post-marketing trials. *Id*.

The documents at issue are not essential to this case. They are Highlands' internal reviews of warning labels and prior studies that speak only to Highlands' *present* state of mind, which Plaintiffs cannot retroactively impute on to Highlands at the time of development and marketing. High000282 (Veloz noted, "the analysis we're seeking from you is not a stand-alone study . . . It's an observation evaluation of other studies and data. . . ."). As an "observation evaluation of other studies and data" rendered to evaluate "whether a temporary recall is warranted, and analyzing information relevant to Highlands' possible [legal] exposure," the memorandum and the correspondence commissioning it are firmly rooted in the present. High000279-000282. Plaintiffs' claims, meanwhile, concern only past behavior, and Highlands has furnished all studies and adverse incident reports relevant to its decision making during that timeframe. Sebastian Letter (April 2, 2020).

2) Plaintiffs possess all underlying facts and can readily produce substantial equivalents.

Plaintiffs seek corroborative, substantially reproducible evidence. In the Ninth Circuit, work product that is capable of substantial reproduction is "supplementary to that already given and tending to strengthen or confirm it" and "is rarely 'necessary.'" *Memry*, 2007 WL 832937, at *2. Plaintiff "bears the burden of proving that he cannot obtain the substantial equivalent of [evidence in question]." *Id*. That burden is not met here.

All underlying facts relevant to Plaintiffs' claims, including all scientific studies related to FDA approval of Dypreza, all correspondence with the FDA related to marketing approval of Dypreza, and all adverse incident reports concerning Dypreza, have already been disclosed to Plaintiffs. These very same facts underpin Johnson's privileged report and the analysis therein. Sebastian Letter (April 2, 2020). The re-production of these facts, this time in fully digested form, would no doubt ease Plaintiffs' counsel's path, but the elimination of such "borrowing" of wits and resources drove the codification of the work product doctrine in *Hickman*, and it should be avoided here. 329 U.S. 495, 516 (1947).

3) Reproduction would not impose undue hardship.

Where alternatives do exist, the Ninth Circuit considers whether requiring the production of alternatives would impose undue hardship on the requesting party. *Fletcher*, 194 F.R.D. at 671. Circuit courts have found that alternative production is unduly burdensome due to either impossibility or exorbitant cost. *Id.* Neither is the case here.

Undue hardship due to impossibility of reproduction applies only where underlying facts have been destroyed. *Castaneda v. Burger King Corp.*, 259 F.R.D. 194, 197 (N.D. Cal. 2009) (finding undue hardship where the subject of study had been altered since the producing party's own reports had been made, rendering reproduction of equivalents impossible). Undue hardship due to exorbitant cost is found to apply only where the requesting party would be required to invest far greater time and money than the possessing party. *Vallabharpurapu v. Burger King Corp.*, 276 F.R.D. 611, 617 (N.D. Cal. 2011) (finding undue hardship where independent reproduction of factual evidence required two years' work and between $630,000 and $825,000).

Plaintiffs cannot show undue hardship. Johnson's report cost $50,000 and required forty-seven days, a far cry from what this Court has deemed "undue." High000281-283. Prior disclosure of all underlying facts renders production of a substantial equivalent possible at similar cost, and Plaintiffs benefit from a readily identifiable pool of experts capable of performing similar analysis. High000282. Any insistence that production is impossible without *Johnson* concedes that the memorandum is so infused with his mental impressions as to render it opinion work product.

Finally, the necessity for production is further reduced "where an available alternative for obtaining the desired information has not been explored" through a "bona fide effort to obtain the information by independent investigation." *Fletcher*, 194 F.R.D. at 674. There is no indication that Plaintiffs have made *any* effort at independent analysis of the readily available factual evidence, undercutting the notion that the analysis itself is essential to their prima facie case. *Id.* at 672.

B. Both the correspondence and report constitute opinion work product, and Plaintiffs fail to meet the burden for discovery.

1. Both documents contain Highlands' representatives' mental impressions.

Opinion work product is that which contains "mental impressions, conclusions, opinions, or legal theories" relevant to anticipated litigation. *U.S. Sec. & Exch. Comm'n v. Talbot*, No. CV 044556 MMM (PLAX), 2005 WL 8154566, at *2 (C.D. Cal. June 27, 2005); *Kintera*, 219 F.R.D. at 507. ("Where the selection, organization, and characterization of facts reveals the theories, opinions, or mental impressions of a party or the party's representative, that material qualifies as opinion work product."). Documents, "including charts and chronologies synthesizing, comparing, and summarizing key facts," even when prepared without direction from counsel, can be opinion work product. *O'Connell*, 2014 LEXIS 198901, at *20 ("Opinion work product is not limited to individuals working for [or as] an attorney.").

As noted above, Veloz commissioned the memorandum to assess Highlands' legal exposure due to elevated litigation risk stemming from the recent EMA recall. High000281. The Chief Legal Officer expressed their impressions and opinions about litigation risks in the correspondence directing Johnson to "breakdown data from adverse events reports" according to patient region of origin and age, "since our exposure is greater for [US and pediatric] patients." High000281. Johnson "selected, organized, and characterized" facts according to Veloz's opinions and impressions during his review of the body of documents, and drew several conclusions relevant to those impressions, including recommendations regarding Dypreza's U.S. and European labels, and Dypreza's initial inconclusive preclinical study. High000301. Both representatives' mental impressions are inextricably embedded in the correspondence and subsequent memorandum.

2. Plaintiffs fail to meet the burden for discovery of opinion work product.

"[M]ental impressions, conclusions, opinions, or legal theories" are "entitled to special protection" and require "a far stronger showing of necessity and unavailability by other means" than does ordinary work product. *Upjohn Co. v. United States*, 449 U.S. 383, 401-2 (1981). To overcome the "nearly absolute protection" afforded to opinion work product, the requesting party must show that: (1) the mental impressions are "at issue in the case," and (2) the need is "compelling," *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992. The present case is not one of those "very rare circumstances" where opinion work product is set aside. *Id.*

1) The mental impressions within the requested documents are not "at issue" in this case.

What is at issue in a negligence claim is the mental state and acts of the responsible party *at the time of the incident*, not that party's own evaluation of the incident and resulting litigation risks *rendered after the fact*. *Id.* In *Korpi v. United States*, for example, plaintiffs submitted a claim against the Coast Guard alleging that their negligence led to the grounding of the plaintiff's ship, the Dialogue. 1996 WL 882598, at *1 (N.D. Cal. Oct. 25, 1996). Plaintiffs sought to compel production of the Coast Guard's "Letter Incident Report" (LIR), which contained the Investigating Officer's retrospective evaluation of the incident and analysis of litigation risks. *Id*. This court held that the LIR was not "at issue" in *Korpi* because it contained mental impressions developed well after the allegedly negligent incident. *Id*.

Here, too, the correspondence and report are not "at issue" in Plaintiffs' negligence claims. Like the LIR in *Korpi*, both are internal reviews of the facts underlying Plaintiffs' claims, and while they "bear upon" those facts, they are not "at issue" because they contain mental impressions formed well after the fact. High000282. Johnson's memorandum, like the LIR, presents opinions regarding Highlands' conduct in the past ("In the context of the [first pretrial] experiment, it was reasonable to deem the study inconclusive"), and provides prescriptions for future investigation, including a new hypothesis regarding adverse incidents and influenza. High000282. Neither Veloz nor Johnson provide direct evidence of Highlands' then-extant state of mind regarding the development and marketing of Dypreza.

2) Plaintiffs can prove their case without the materials in question, and their need falls far short of "compelling."

Assuming, *arguendo*, that the requested documents did contain mental impressions and opinions "at issue," Plaintiffs fail to show "compelling need," which "usually equates to an inability to prove [the] case if the material is not made available." *Korpi*, 1996 WL 882598, at *1. This court held in *Korpi* that the requesting party failed this showing when "all of the evidence available to the [possessing party's] investigator who produced the [report]" was available to the requestor. *Id*. at 2. *Korpi* held that the requesting party "should not be allowed to have access to the

[investigator's] opinions merely because such opinions could possibly be helpful or interesting," equating such a discovery motion to an effort to "borrow[] the wits of their adversaries," and to "exploit[] . . . a party's efforts in preparing for litigation." *Id.* (quoting *Hickman*, 329 U.S. at 516).

Plaintiffs have access to all data underlying Johnson's report. Sebastian Letter (April 2, 2020). Given Plaintiffs' possession of all underlying facts, "there is no reason why Plaintiff[s] cannot move forward with this case, and also no reason why Plaintiff[s] could not hire [their] own experts to evaluate the evidence." *Korpi*, 1996 WL 882598, at *2. Courts have been reluctant to find "compelling need" where information substantially equivalent to that desired by the requesting party may be obtained from other witnesses for whom privilege is not a concern. *Century Sur. Co. v. Saidian*, No. CV 12-7428 SS, 2015 WL 12765555, at *2 (C.D. Cal. July 28, 2015). Plaintiffs' ability to depose both Highlands' and University of Medford's employees further defeats any need to invade Highlands' work product in pursuit of equivalent evidence.

IV. CONCLUSION

This court should deny Plaintiffs' motion. The email chain and memorandum Plaintiffs seek to compel qualify as both ordinary and opinion work product, and Plaintiffs fail to meet the minimum showing required to overcome that privilege.

Dated:

Respectfully submitted,

By: */s/ Hayk Esaghoulyan*

Attorney for Highlands Pharmaceuticals, Inc.

DATED:

By: */s/ Hayk Esaghoulyan*
Hayk Esaghoulyan
Attorney for Highlands Pharmaceuticals, Inc.

Motion for Summary Judgment in Student Speech Case, Representing Plaintiff

[Submitted to Law 7816: Advanced Legal Writing—Litigation]

I. INTRODUCTION

Tinker v. Des Moines re-affirmed that students retain their First Amendment rights within the schoolhouse gate, allowing administrators to circumscribe those rights only in "carefully restricted circumstances" that threaten student safety or forecast substantial disruption to the school environment. The Ninth Circuit in *McNeil v. Sherwood Sch. Dist*., meanwhile, held that a school may punish student speech originating off-campus only where that speech forms an adequate nexus to the school environment. Courts in the Ninth Circuit have required school districts to first meet the burden of *McNeil*'s nexus test before turning to the substantial disruption showing under *Tinker*.

Blue Mountain Middle School did not abide by these high bars and narrow exceptions when Mr. McGonigle, the subject of a private parodic social media profile made by student J.S., took offense and chose to mete out punishment typically reserved for students entering campus armed with knives. A student's mere reference to her principal, dragged onto campus by the disciplining administrator, does not establish nexus. Brief comments in a math class and blithe remarks in the hall likewise fall far short of the high bar for substantial disruption required by *Tinker*.

The Court should enforce the substantial burden that both the Ninth Circuit and Supreme Court have deemed necessary to a proper balance between the special interests of the school environment and students' First Amendment rights. This requires condemning the unconstitutional violation of J.S.'s First Amendment rights. To hold otherwise trivializes these protections, and grants school administrators unfettered disciplinary power over nearly every word to which they take offense, at school, online, and at home.

II. FACTS

On a Sunday night in March, J.S. created a MySpace profile of her principal, James McGonigle. J.S. Dep. 10:10, 13:6. The profile did not identify McGonigle by name, but used his district website profile picture. J.S. Dep. 15:9, 18:2. J.S. intended the page to be a parody that was "comical," to the extent that it was "outrageous." J.S. Dep. 11:18-20, 77:8-14. The page generally depicted McGonigle as a pedophile through the use of the page URL ("kids rock my bed"), and a vulgar list of "interests" ("f[ ]ing in my office; hitting on students and their parents"), and suggested that McGonigle made sexual advances towards both students and parents. J.S. Dep. 21:22.

J.S. gave twenty-two Blue Mountain students access to the profile. J.S. Dep. 29:21-22. J.S. understood that students were not able to view the profile on campus due to content filters and locked cellphone bags. J.S. Dep. 57:11-13. The profile nevertheless caused "rumblings" when students returned to campus on Monday. Nunemacher Dep. 23:9-11. J.S. was approached by a few classmates who invariably remarked that the profile was "hilarious" and "funny." J.S. Dep. 31:14.

The profile generated only two brief instances of classroom discussion. Mr. Nunemacher noted that in his eighth-grade algebra class, "a couple of kids . . . decided they were going to start talking about it," requiring Nunemacher to raise his voice and redirect them to their work—a weekly occurrence in his class. Nunemacher Dep. 11:14-18. While Nunemacher can, and has, referred incorrigible students to McGonigle, the students in question were not sufficiently disruptive to warrant formal discipline. Nunemacher Dep. 22:3-5. The second teacher similarly redirected her students to their work, and they complied without requiring formal reprimands. McGonigle Dep. 142:20.

Principal McGonigle learned of the profile due to a passing remark by a student, and first saw the profile when that student, at McGonigle's instruction, brought a printed copy to campus. McGonigle Dep. 33:1-24. Shortly after, he viewed the profile from his office computer. McGonigle Dep. 54:16-22. At no other time did the MySpace profile reach campus, whether digitally or physically. McGonigle Dep. 63:3-6.

On Thursday, J.S. was called to McGonigle's office, who described his state at the time as "very upset and very angry, hurt." McGonigle Dep. 85:22-24. Following a threat of legal action, McGonigle threatened that if she "was a guy," she would "already be through the wall." J.S. Dep. 54:1-4. McGonigle issued a ten-day suspension due to a "level four" infraction, based on "false accusations against the staff." McGonigle Dep. 59:3-6. McGonigle concedes that the only other instances of ten-day suspensions dealt with students who came to school carrying knives or federally scheduled controlled substances. McGonigle Dep. 18:1-14. The disciplinary meeting with J.S. required a guidance counselor to reschedule appointments with two students in order to be present. McGonigle 4:15-24.

McGonigle's attempts to instigate criminal charges against J.S. were rejected by both local and state police, but he nevertheless included an empty threat of criminal consequences in the disciplinary notice sent to J.S. and requested that state police haul J.S. to their station for a verbal warning. McGonigle Dep. 132:15, 163:20-22. Three weeks later, McGonigle again unsuccessfully attempted to pursue legal action, this time through a private attorney. McGonigle Dep. 102, 103.

McGonigle admits that no person believed the parodic profile to be true, that he has suffered no professional harm, and that no administrative investigation or disciplinary action was initiated in response to the claims and characterizations within the profile. McGonigle Dep. 165:19. McGonigle does cite a generalized "deterioration" in class discipline but largely attributes it to the present lawsuit, not J.S.'s speech itself. McGonigle Dep. 153-55.

III. Argument

The School District's punishment of J.S.'s speech was unconstitutional. In order to justify its punishment of student speech originating off campus, the School District must both establish a nexus between the speech and the campus, and subsequently show that punishment was warranted under the *Tinker* standard.[1] First, the facts do not support a nexus finding under *McNeil* due to an absence of actual

[1] The *Fraser* standard, which allows for the punishment of "lewd and obscene" speech that intrudes upon the school's "basic educational mission," applies *only* to on-campus speech, and cannot justify the School District's actions in response to speech originating in the home of J.S. *Morse*, 551 U.S. at 405 (holding that *Fraser*'s "first principle" makes clear that Fraser's First Amendment rights were circumscribed "in light of the special

or augured harm, and the lack of reasonable foreseeability of the speech reaching and impacting the school environment. Second, the School District has failed its burden under *Tinker* due to the absence of material and substantial disruption as a result of J.S.'s speech. Blue Mountain acted on little more than undifferentiated fear and apprehension, and the personal outrage of Principal McGonigle. Either failure, standing alone, renders the School District's actions unconstitutional.

The School District asks this court to divorce the nexus and substantial disruption tests from their purpose—to ensure the safety of students in the school environment—by holding that the School District may render *any* student speech "campus speech," so long as it relates in some manner to the school community. The Court should reject this self-serving, unconstitutional line of reasoning.

A. The School District's punishment of J.S.'s online, off-campus speech was unconstitutional because it cannot establish a sufficient nexus between the school and the speech under *McNeil*.

As a threshold matter, a school may not punish student speech unless it can show that the speech concerned the school environment, reached that environment, and was accompanied by actual or augured harm and impact to that environment, thereby forming a nexus. *McNeil v. Sherwood School District 88J*, 918 F.3d 700, 708. The School District fails this showing. J.S.'s off-campus speech did not cause or auger any harm, and it was not reasonably foreseeable that J.S.'s speech would reach and impact the school. While the content and context of J.S.'s speech may have related to the Blue Mountain community, a finding of nexus on those grounds alone would undercut precedential efforts to maintain the schoolhouse gate as a meaningful marker of student speech rights.

1. The School District cannot show an adequate nexus on the basis of harm because J.S.'s speech did not cause or augur harm.

characteristics of the school environment, and "had Fraser delivered the same speech in a public forum outside the school context, it would have been protected"); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011) ("[F]or speech to be regulated as 'vulgar and lewd' under *Fraser*, that speech must be determined to be in-school speech").

The degree and likelihood of harm to the school caused or augured by Jill's speech does not support a nexus finding. The harm consideration in *McNeil* asks whether student speech posed a "credible safety threat." *McNeil*, 918 F.3d at 709 (finding such a threat where student created a "hit list" of "specific targets" among the student body "accentuated . . . with the phrases 'I am *God*' and 'All These People *Must* Die"). The *McNeil* court noted that threatening speech that concerns campus and reaches campus does not contribute to finding nexus where the threat is not credible. *Id*. at 709 (citing *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004), where a "two-year-old, highly fantastical" drawing of an attack on the school "unaccompanied by other indicia of a violent intent" that reached campus did not justify student's expulsion).

The policy underpinning this consideration parallels that of *Tinker*: state assurance of student safety. *See Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Justice Alito notes that the circumscription of student speech rights is justified by the character of schools as "places of special danger," where both student and parent are severely restricted in their ability to control the former's surroundings). J.S.'s speech did not communicate a credible threat of *any* nature—much less a threat of serious harm—and the School District has no regulatory authority on the basis of this nexus consideration. *See Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) ("A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting . . .").

J.S. created the profile intending it to be "comical" to the extent that it was "outrageous," J.S. Dep. 11:18-20, and it was received as such, with classmates who approached J.S. about the profile invariably noting that it was "funny" and "hilarious." J.S. Dep. 31:14. The School District also viewed the profile as incredible, declining to formally probe McGonigle's characterization as a pedophile. McGonigle Dep. 165:19, 166:7. McGonigle admits that *no* person has taken the parody seriously, and that he has suffered no professional harm as a result of the profile. *Id*.

Any argument that the profile caused or augured harm by generating fears of sexual predation ignores the facts and rests on bad policy. As noted above, J.S., her peers, and the School District correctly understood the profile to be a parody. J.S. Dep. 31:14. Further, the Department of Education has found

that nearly ten percent of students are targets of educator sexual misconduct sometime during their school career, with only *six percent* reporting such sexual abuse. U.S. Department of Education Office, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, 20, 34 (2004). To hold that a student's mention of officials' sexual misconduct may lead to punishment will further depress already concerning reporting rates.

Finally, McGonigle attributes much of the generalized deterioration of discipline among J.S.'s peers to the present litigation, and not the speech of J.S. McGonigle Dep. 155. The Court should reject the district's effort to manipulate the harm inquiry by retroactively attributing the results of J.S.'s efforts to vindicate her rights to the underlying speech and unreasonable discipline actually at issue.

2. The School District cannot show an adequate nexus based on the foreseeability of J.S.'s speech reaching and impacting the school environment because McGonigle alone brought the profile to campus, and actual impact consisted of brief conversations and offered no basis for fears of escalation.

It was not reasonably foreseeable that J.S.'s speech would reach Blue Mountain's campus absent McGonigle's own conduct. This consideration favors a nexus finding where speech "targets" school—by dealing with, and being addressed to, members of the community—and actually does reach the school community. *Shen v. Albany Unified Sch. Dist.*, No. 3:17-CV-02478-JD, 2017 WL 5890089, *6 (N.D. Cal. Nov. 29, 2017) (holding that the foreseeability inquiry is "focus[ed] on the subject and addressees of the speech at issue"). Courts have found a wide range of secondary facts to favor the foreseeability of speech reaching school, including the presence of notification procedures which make parents and students aware of the speech in question, *McNeil* 918 F.3d at 709, close relation between the speech and ongoing social tensions at school, *Shen* 2017 WL 5890089, at *7, and any effort by plaintiff to alert the campus community to her speech, *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1111.

J.S. did not intend for the profile to be accessed from school and knew that it could not be accessed from school because of filters on school computers and the use of magnetic bags for student cellphones. J.S. Dep. 57:11-13. J.S. set the profile to private, making it accessible to only twenty-two of

her friends. J.S. Dep. 15:9. J.S. made no attempts to direct Blue Mountain students to the profile, only remarking on it when approached by her peers. J.S. Dep 31:14. The profile did not relate to any ongoing controversy at Blue Mountain and was not the subject of any mandatory notification procedures.

The profile "actually reached" school despite the above because of McGonigle alone. That fact should weigh against a reasonable foreseeability finding. The only physical copy of the profile brought to campus was brought to McGonigle at his request, and McGonigle was the only person to view a digital copy of the profile on campus. *Id*. at 54:16-22. To hold that "reaching campus" in this way favors reasonable foreseeability will allow administrators to put their thumb on the scale, manufacturing a nexus by themselves dragging student speech from the home onto campus.

The lack of reasonably foreseeable impact also mitigates against a nexus finding. In finding reasonably foreseeable impact, the *McNeil* test considers the speech's likelihood of causing "classroom distractions and substantial disruption." 918 F.3d at 709-10. Because the nexus test is a recent amalgamation of existing threshold tests from outside the circuit, the analysis of reasonable foreseeability under those pre-existing standards is informative. *Id*. at 707. For foreseeable impact to contribute to nexus, courts have consistently required a significant impact upon the school environment. *E.g. McNeil*, 918 F.3d at 705 (students transferred from the district, others missed several days of class, one brought a knife to campus to "defend himself" from the threats communicated by McNeil); *Shen*, 2017 WL 5890089 at *6-8 (students were "were crying hysterically and talking loudly about the posts," forcing the school to call in mental health counselors, and driving some to miss school for days); *Kowalski* 652 F.3d at 574 (a social media profile caused the targeted student to miss school); *Doninger* 642 F.3d at 349 (a blog post caused students and parents to flood administrators with calls and emails, interfered with administrators' duties, and drew a group of "fired up" students to administrator offices).

The present facts fall far short of the above standard. The impact of J.S.'s speech was limited to generalized "rumblings" and two brief classroom conversations, which were abandoned at the direction of teachers. Nunemacher Dep. 17:6-22. The discussions among students were comparable to routine classroom chatter, and at no point did a teacher feel the need to impose formal discipline. *Id*. There are no

facts suggesting that students missed any portion of even a single class, that any students became noticeably upset, or that any administrators were unable to fulfill their duties as a result of J.S.'s parody.

3. The content and context of J.S.'s speech does not support a nexus finding, and finding nexus on this factor alone undermines the balance struck by the nexus test.

The content of J.S.'s speech only loosely related to Blue Mountain, while the context of her speech (J.S.'s living room on a Sunday evening) is entirely unconnected to campus. This factor mitigates in favor of nexus where the subject of the speech involves the school community and its members, *McNeil*, 918 F.3d at 711, and the context is "in close temporal and physical proximity to the school, on property that is not obviously demarcated from the campus . . . ." *C.R.*, 835 F.3d at 1151. Here, the text of J.S.'s profile did not identify McGonigle or Blue Mountain, with McGonigle's profile picture presenting the only explicit link to campus. J.S. Dep. 15:9. Further, the profile bore no temporal or physical proximity to the school, having been made in J.S.'s home on a Sunday evening.

Even if content and context is found to favor a nexus, a finding of sufficient nexus on this factor alone, absent harm and reasonable foreseeability of impact, will undermine both the Ninth Circuit and Supreme Court's determination that students "enjoy greater freedom to speak when they are off campus than when they are on campus . . . ." *McNeil* 918 F.3d at 706; *see Fraser*, 478 U.S. at 404. This distinction stems from the underlying justification of a school's authority to circumscribe student speech— the continued safety of students despite their limited control over their environment and associations on campus. *Morse*, 551 U.S. at 424. Nexus absent harm and foreseeable impact untethers a school's ability to punish from its underlying justification, allowing a school district to impose discipline on nearly *all* conversations between students and their social circles. McGonigle suggests as much when he asserts that a public statement made in the middle of a San Francisco park, without *anyone* from school present, would be punishable should it concern school and be dragged back to the school. McGonigle Dep. 68:1-16. It must be appreciated that nearly *all* statements made by school-aged children pertain in some manner to their school community, be it their friends, teachers, administrators, homework, after-

school activities, etc. The high burden imposed by *McNeil* undermines the notion that the Ninth Circuit intended to grant school districts *carte blanche* powers to regulate speech.

B. The punishment of J.S.'s speech was also unconstitutional because the School District cannot meet its burden under either prong of the *Tinker* test.

The School District cannot meet its burden under *Tinker*. There, the Supreme Court held that a school seeking to justify the prohibition or punishment of student speech or expressive conduct, "must be able to show that [the speech] would [1] materially and substantially interfere" with the school environment or [2] invade the rights of other students to be secure and to be let alone. *Tinker*, 393 U.S. at 508-09. The School District cannot make either showing. With regards to material and substantial interference, the School District can point only to generalized rumblings and brief classroom conversations. It can make no colorable argument regarding the invasion of the rights of other students.

1. The School District cannot show material and substantial interference because the facts show only generalized "rumblings," brief classroom discussions, and minimal disruptions of administrator schedules.

In *Tinker*, the Court held that where student speech "caused comments, warnings by other students, the poking of fun at [plaintiffs]," and led to a mathematics lesson being "practically wrecked . . . by disputes," there was *no* material and substantial interference. *Id*. at 517. This Court, the Ninth Circuit, and sister circuits have each required a far greater degree of disruption when finding that School Districts have met this prong of *Tinker*. *Shen*, 2017 WL 5890089, at *8 (finding material and substantial interference where students gathered in hallways "all too upset to go to class," and "were crying hysterically and talking loudly about the [online posts]"); *McNeil*, 918 F.3d at 705 (finding the same where students missed several days of class, parents transferred students from the district, and one student brought a knife to campus to 'defend himself'"); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007) (finding the same where student's teacher requested not to teach student's class, forcing school to provide a substitute for the remainder of the year); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 773-4 (8th Cir. 2012) (finding the same where speech

generated bullying and discrimination, parents contacted the school with safety concerns, local media arrived on campus, and teachers complained of "the most disrupted day of their teaching career").

The facts here fall far short of the already insufficient facts in *Tinker*. J.S.'s speech did not cause students to comment, warn each other, or poke fun at anyone, *Tinker*, 393 U.S. at 517, with hallway encounters being limited to a handful of students approaching J.S. to note that the profile was "funny." J.S. Dep. 31:14. J.S.'s speech did not cause a class to be "practically wrecked . . . by disputes," *Tinker*, 393 U.S. at 517—classroom discussions were limited to "a couple of kids" discussing the profile for "a minute or two" before returning to their work when redirected by their teacher, who noted that similar chatter takes place on a weekly basis. Nunemacher Dep. 11:14-18, 13:18-21. While the need to pull administrators away from ordinary tasks to respond to the effects of a student's speech is a relevant factor to this inquiry, the disruption to schedules must be "outside the realm of ordinary school activities." *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1114, 1118. Here, a single counselor was required to shift her duties for a total of twenty-five minutes while McGonigle met with J.S. McGonigle Dep. 4:15-24.

On similar facts, the Third Circuit has held that "rumblings," some student discussions lasting several minutes, and minor administrative rescheduling do not constitute material and substantial interference under *Tinker*. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 921-22 (3d Cir. 2011); *see also Layshock v. Hermitage School Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (finding, on similar facts, that discussions regarding a mocking social media profile of the principal did not rise to the level of substantial disruption where no classes were cancelled and no "widespread disorder" ensued).

2. The School District cannot show that J.S.'s speech invaded the rights of other students to be secure.

J.S.'s speech did not "impinge upon the rights of other students." *Tinker*, 393 U.S. at 509. This inquiry sets a high bar, and mere offense is not enough. *Wynar*, 728 F.3d at 1072 ("[I]t is certainly not enough that the speech is merely offensive to some listener . . . ."); *J.C. ex rel. R.C.*, 711 F. Supp.2d at 1123 ("[T]he court is not aware of any authority . . . that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This

court declines to be the first."). The limited circumstances that do meet this standard require serious harm to students', not administrators', right to be secure. *C.R. v. Eugene Sch. Dist. 4j*, 835 F.3d 1142, 1152 (9th Cir. 2016) (holding that sexual harassment implicates students' right to be secure); *Wynar*, 728 F.3d (holding that the threat of a school shooting implicates the same).

The record fails to show that the rights of any students were invaded. A number of J.S.'s peers approached her to express their amusement with the profile, J.S. Dep. 31:14, but no student expressed fear, concern, or offense. Unsupported assertions that some students may have been offended, frightened, or emotionally harmed by the profile should be rejected. *J.S. ex rel R.C.*, 711 F. Supp.2d at 1123.

IV. Conclusion

The School District has failed both its burden to establish a nexus between J.S.'s speech and the school environment, and its subsequent burden to show material and substantial disruption. Accordingly, this court should grant J.S.'s motion for summary judgment.

Words: 3983 Limit: 4000

Applicant Details

First Name	**Nicholas**
Last Name	**Gunther**
Citizenship Status	**U. S. Citizen**
Email Address	**nicholas.gunther@wustl.edu**
Address	**Address** **Street** **695 Gillaspie Dr** **City** **Boulder** **State/Territory** **Colorado** **Zip** **80305** **Country** **United States**
Contact Phone Number	**303-817-7543**

Applicant Education

BA/BS From	**Arizona State University**
Date of BA/BS	**May 2018**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 21, 2021**
Class Rank	**50%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate, Habeas, Prison Litigation, Pro Se**

Recommenders

Hoppenjans, Lisa
lhoppenjans@wustl.edu
3149358980

Ali, Yaser
yali@yaseralilaw.com
321-795-7236

Romeo, Karen
karen.romeo@judicial.state.co.us
(970) 547-2634

References

Judge Jason Carrithers
Colorado 1st Judicial District
jason.carrithers@judicial.state.co.us
(303) 579-4874

Professor Lisa Hoppenjans
Washington University
School of Law
lhoppenjans@wustl.edu
(314) 935-8980

Steven Miller
Department of Energy,
Office of the General Counsel

smiller173@aol.com
(202) 329-4527

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nicholas Gunther
695 Gillaspie Dr.
Boulder, CO 80305
(303) 817-7543
Nicholas.gunther@wustl.edu

June 23, 2023

The Honorable P. Casey Pitts
United States District Court
Northern District of California
Robert F. Peckham Federal Building and U.S. Courthouse
280 S 1st St
San Jose, CA 95113

Dear Judge Pitts:

I am writing to apply for a one-year clerkship in your chambers beginning in August 2023. I am currently a term law clerk for the Honorable Jason Carrithers of the Colorado 1st Judicial District, and I have been admitted to the Bars of Colorado and the District of Columbia. My post-law school civil practice experience includes litigating as an associate attorney at an employment law boutique.

Enclosed please find my resume, transcript, and writing samples. My first writing sample is an order I prepared for Judge Carrithers on a motion to dismiss. My second writing sample is a draft paper I submitted for consideration by the Washington University Law Review Online. The following individuals have agreed to serve as references on my behalf and welcome inquiries.

Judge Jason Carrithers Colorado 1st Judicial District jason.carrithers@judicial.state.co.us (303) 579-4874	Professor Lisa Hoppenjans Washington University School of Law lhoppenjans@wustl.edu (314) 935-8980	Steven Miller Department of Energy, Office of the General Counsel smiller173@aol.com (202) 329-4527

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Nicholas Gunther

NICHOLAS GUNTHER
695 Gillaspie Dr. Boulder, CO 80305 | (303) 817-7543 | nicholas.gunther@wustl.edu

EDUCATION

Washington University School of Law St. Louis, MO
J.D. | GPA: 3.61 (Top 1/3 = 3.65) May 2021
Honors: Dean's List; CALI: Lawyer Ethics (first in class); Dean's Service Award (192 pro bono hours)
Activities: Washington University Sexual Assault Investigation Board; Honor Council Investigative Committee
Colorado 5th Judicial District (Judicial Intern)

W. P. Carey School of Business at Arizona State University Tempe, AZ
B.A. in Business Law | *summa cum laude* May 2018
Honors: Barrett, The Honors College, Thesis: "Potential conflicts of interest in the formation and operation of Arizona School Tuition Organizations"; National Merit Scholarship
Internships: **Ali Legal PLLC** (Real Estate/Trusts and Estates intern)
U.S. Department of Justice – Office of Tribal Justice (Legal Fellow)
City of Phoenix Prosecutor's Office (Victim Services Intern)

JUDICIAL CLERKSHIP

Colorado 1st Judicial District Golden, CO
Law Clerk to the Honorable Jason Carrithers June 2022 – Present

- Draft civil litigation orders including dismissals, summary judgments, and determinations of questions of law
- Draft orders on county court appeals and post-conviction criminal motions, assist with division calendar management
- Clerk for both civil and criminal jury trials, ensure proper juror sequestration, and organize jury instructions

EXPERIENCE

Alan Lescht & Associates, P.C. Washington, DC
Associate Attorney Sep 2021 – Apr 2022

- Represented public and private sector employees in workplace discrimination, whistleblower, and FMLA claims
- Drafted critical motions and legal briefs for injunctive relief and opposing summary judgment and motions to dismiss
- Drafted pleadings, drafted discovery requests and responses, and assisted with document review and production
- Second chaired depositions and prepared deposition outlines and deposition exhibits

U.S. Department of Justice – National Courts Section Washington, DC
Legal Fellow Oct 2020 – Dec 2020

- Drafted motions and replies for federal contract disputes in the United States Court of Federal Claims
- Prepared slides for mediation presentations, summarized expert reports, and second chaired depositions

U.S. Department of Energy – Office of the General Counsel Washington, DC
Legal Fellow Aug 2020 – Dec 2020

- Prepared legal memoranda for civilian nuclear program litigation and environmental compliance actions
- Edited congressional testimony and MOUs between the federal government, states, and industry

Colorado 20th Judicial District – Office of the District Attorney Boulder, CO
Student Practice Intern May 2020 – Aug 2020

- Presented misdemeanor plea offers in a fast-paced environment when courts reopened after the COVID-19 shutdown
- Reviewed law enforcement body camera footage, drafted sentencing arguments, and argued bond hearings

City of St. Louis Circuit Attorney's Office St. Louis, MO
Student Practice Intern Jan 2020 – May 2020

- Argued misdemeanor probable cause and bond hearings on the record before circuit judges
- Participated in case reviews and meetings with victims and law enforcement officers
- Second chaired an armed robbery trial and assisted with voir dire, evidence organization, and objections

BAR ADMISSIONS: Colorado; District of Columbia **VOLUNTEERING:** Score mock trial and forensics competitions

Washington University in St. Louis

Office of the University Registrar

Record Of: **Gunther, Nicholas**
Student ID Number: 468426

Degrees Awarded:
JURIS DOCTOR MAY 21, 2021

Transcript Issued 07/09/2021 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2018

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (DROBISH)	LAW	W74 500U	2.0	B+
CONTRACTS (BAKER)	LAW	W74 501H	4.0	A-
PROPERTY (SACHS)	LAW	W74 507W	4.0	B+
TORTS (TAMANAHA)	LAW	W74 515D	4.0	B+

Enrolled Units 14.0 Semester GPA 3.50 Cumulative Units 14.0 Cumulative GPA 3.50

Spring Semester 2019

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	CR
LEGAL PRACTICE II: ADVOCACY (DROBISH)	LAW	W74 500Z	2.0	B+
CRIMINAL LAW (INAZU)	LAW	W74 502M	4.0	A-
NEGOTIATION (TOKARZ)	LAW	W74 503G	1.0	CR
CIVIL PROCEDURE (HOLLANDER-BLUMOFF)	LAW	W74 506M	4.0	B+
CONSTITUTIONAL LAW I	LAW	W74 520P	4.0	A

Enrolled Units 16.0 Semester GPA 3.61 Cumulative Units 30.0 Cumulative GPA 3.55

Fall Semester 2019

EVIDENCE (ROSEN)	LAW	W74 547K	3.0	B+
LAWYER ETHICS (ROSEN)	LAW	W74 561D	2.0	A+
EMPLOYMENT LAW (KIM)	LAW	W74 613B	3.0	B+
IMMIGRATION LAW (MEYER)	LAW	W74 630E	3.0	A-
PRETRIAL PRACTICE: CRIMINAL	LAW	W74 658Z	3.0	P

Enrolled Units 14.0 Semester GPA 3.61 Cumulative Units 44.0 Cumulative GPA 3.57

Spring Semester 2020

AESTHETICS	PHIL	L30 438	3.0	A+
CORPORATE AND WHITE COLLAR CRIME	LAW	W74 642D	2.0	CR
NATURAL RESOURCES LAW (HEISEL)	LAW	W74 691B	2.0	CR
INTRODUCTION TO ENERGY LAW (PERRYMAN)	LAW	W74 691E	1.0	B+
THE INTERACTION OF BUSINESS, GOVERNMENT, AND PUBLIC POLICY IN A DEMOCRATIC SOCIETY (KALLEN)	LAW	W74 699B	1.0	A
PROSECUTION CLINIC	LAW	W74 731	6.0	CR

Enrolled Units 15.0 Semester GPA 3.67 Cumulative Units 59.0 Cumulative GPA 3.58

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis

Office of the University Registrar

Record Of: **Gunther, Nicholas**
Student ID Number: 468426

Fall Semester 2020

SPEECH, PRESS & THE CONSTITUTION (RICHARDS)	LAW	W74 609K	3.0	B+
BANKRUPTCY (KEATING)	LAW	W74 645A	3.0	B+
CONGRESSIONAL AND ADMINISTRATIVE LAW EXTERNSHIP (VON ROHR)	LAW	W74 787D	8.0	CR

Enrolled Units 14.0 Semester GPA 3.40 Cumulative Units 73.0 Cumulative GPA 3.55

Spring Semester 2021

MEDIA LAW (HOPPENJANS)	LAW	W74 528H	3.0	A
CRIMINAL PROCEDURE: INVESTIGATION (EPPS)	LAW	W74 542L	3.0	A
NONPROFIT PLANNING, DRAFTING & NEGOTIATION (SANT)	LAW	W74 572A	1.0	A
ARBITRATION LAW THEORY & PRACTICE (O'DONNELL)	LAW	W74 612A	3.0	A
ADVANCED TOPICS IN FOREIGN RELATIONS LAW SEMINAR (WATERS)	LAW	W76 790S	3.0	A-

Enrolled Units 13.0 Semester GPA 3.83 Cumulative Units 86.0 Cumulative GPA 3.61

Remarks

SP2020 FROM: WU ARTS & SCIENCES LAW SCHOOL ELECTIVE 3.0 UNITS
SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.

Distinctions, Prizes and Awards

SP2021 DEAN'S LIST
SP2021 DON SOMMERS AWARD IN PROFESSIONAL RESPONSIBILITY
SP2021 DEAN'S SERVICE AWARD

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis
Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

Washington University in St. Louis is accredited by the Higher Learning Commission www.hlcommission.org, and its schools by various professional accrediting bodies. The CEEB code is 6929.

Transcript Nomenclature
Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

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Washington University in St. Louis
SCHOOL OF LAW

May 30, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

RE: Recommendation for Nicholas Gunther

Dear Judge Pitts:

I am writing to provide my highest recommendation in support of Nicholas Gunther's clerkship application.

Nicholas was a student in my media law course in May 2021 and impressed me with his strong research and writing skills, thorough preparation, and thoughtful class participation. I also came to know Nicholas through discussions during office hours, where we discussed Nicholas' interest in applying the materials learned in class to his own pending Freedom of Information Act request, his passion for the First Amendment, and his interest in public service work.

As a law school clinician and experienced litigator, I structured the assignments in my media law course to emphasize real-world application of the law and the skills students will need to be successful attorneys. Students were evaluated primarily on the basis of two legal research memoranda that required them to apply our in-class learning to identify relevant issues and then to conduct legal research to evaluate how a hypothetical client's claims or defenses would fare in a particular jurisdiction. These assignments are designed to require the type of legal research, writing, and analysis that students will need as young associates or as legal clerks.

Nicholas received one of the highest grades in the course, and received the only perfect score I awarded all semester on his first assignment. Nicholas' memoranda reflected excellent legal research skills, organization, analysis and writing, on par with the best young associates I have worked with in my career. In addition, Nicholas was a thoughtful and well-prepared participant in class discussions and contributed respectfully during discussions of controversial topics. His preparedness and contributions were particularly impressive given our remote learning environment at the time.

Nicholas also excelled in other areas during his time in law school, graduating in the top one-third of the class. He received the Dean's Service Award for his extensive pro bono service. His commitment to public service is clear from his work during law school with both his hometown prosecutor's office and the St. Louis Circuit Attorney's Office. During law school Nicholas also held a joint internship with the Department of Energy, Office of the General Counsel and the Department of Justice, National Courts Section.

As a former law clerk to the Hon. Susan H. Black of the Eleventh Circuit Court of Appeals and a former law firm partner at a St. Louis boutique litigation firm, Dowd Bennett LLP, I understand what is required to be a successful clerk and successful young lawyer. Nicholas has all of the traits and skills to be an outstanding addition to your chambers, and I give him my strongest recommendation without hesitation.

If you have any questions regarding Nicholas's application, please do not hesitate to contact me.

Best,

/s/

Lisa S. Hoppenjans
Director, First Amendment Clinic
Assistant Professor of Practice

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-8980

Lisa Hoppenjans - lhoppenjans@wustl.edu - 3149358980

YASER ALI LAW
WWW.YASERALILAW.COM

Yaser Ali
Ali Legal, PLLC
4500 S. Lakeshore Dr. Ste 510
Tempe, Arizona 85282

Telephone 480.442.4175
yali@yaseralilaw.com

February 20, 2020

Re: Nicholas Gunther Clerkship Application

To Whom It May Concern:

It is my pleasure to be writing this letter of recommendation for Nick Gunther.

First, allow me to introduce myself. My name is Yaser Ali. I am currently the managing attorney at a boutique estate and business planning law firm in Tempe, Arizona. I have a graduate degree in education from Harvard University, a law degree from the University of California, Berkeley, have clerked for the Honorable Judge Damon J. Keith of United States Court of Appeals for the Sixth Circuit, and worked at one of Arizona's most prestigious law firms before starting my own firm in 2015. Over the years I have interacted with hundreds of students. Nick Gunther is one of the most well-rounded and promising law students I have ever met.

I first met Nick in 2016 when he interviewed for an open legal intern position at my office. From the moment I met him, I could tell he had a promising career ahead of him. Duly impressed with his confidence, maturity, and ability to grasp sophisticated legal arguments as an undergraduate student, I offered him a position during the interview. From 2016 to 2018, during the academic year, Nick worked directly under me and has proven to be a huge asset to our firm.

One of the first projects I assigned Nick was to assist a client in the formation of an Arizona school tuition organization, a 501(c)(3) tax-exempt non-profit corporation that functions to award tuition scholarships to deserving students at private schools in the state of Arizona. Nick displayed tremendous initiative on the project as he helped develop the organization's mission and vision statements, drafted a business plan and projected budget, organizational bylaws, and prepared a draft of the IRS' onerous nearly 30-page application, along with all the requisite documents required by the state agencies. He also assisted in preparing scholarship applications and even website development for the new corporation. With Nick's help and leadership, the organization was able to raise over $300,000 in scholarships for low-income students in its first year of existence.

Nick's experience with non-profit formation and organization will be an asset in federal court should organizations appeal an IRS denial of tax-exempt status or IRS rulemaking. Nick also worked to identify ethical issues present in similar non-profits and ensure our own non-profits operated with the highest ethical standards. As a former federal clerk, I may assure you that Nick's experience with non-profit organizations and research skills will be a tremendous asset to any judicial office.

My office also prepares estate plans for a wide array of clients from different backgrounds, including individuals seeking to incorporate unique religious preferences into their wills or trusts. Being respectful of these client's desires and wishes is integral component of the service we provide. Nick participated in all components of the estate planning process from the initial meetings, to drafting of documents, and execution of plans. Nick demonstrated the utmost professionalism, very good judgment and a strong sense of responsibility when working with each of these clients. Respect is a

quality that is earned, not given, and as many of my clients would attest, Nick quickly earned this distinction.

I am fully confident in Nick's ability to persevere and succeed in his pursuit of a judicial clerkship. He is a talented writer, has a great personality, and has stellar academic credentials. When necessary, he uses all available resources to gain knowledge, understanding and insight. He is an effective communicator and carries himself with great poise when speaking or leading, all of which are necessary traits of someone who wishes to succeed as part of a judicial team.

Outside the classroom and the law office, Nick is committed to social justice and helping others. As he moves forward in his life, I am confident that Nick will be an integral part of his society and those around him, and it is in this context that he will realize his full potential to be a source of positive change as an officer of the Court.

In conclusion, Nick is a bright young man who is passionate about helping others and uniquely qualified to excel in law school and beyond. It is for these reasons that I enthusiastically recommend Mr. Nick Gunther for a judicial clerkship. If I can be of any other assistance to you please do not hesitate to contact me.

Sincerely,

Yaser Ali
Managing Attorney
Ali Legal, PLLC